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DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

v.

NEIL MARTIN CHRISMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an individual is validly under arrest and asks to be given access to an area, may the arresting officer accompany the individual into such area without first obtaining a search warrant authorizing entry into such area?

2. When an officer is standing immediately outside the premises in the doorway of the premises and his presence is known to the occupants, one of the occupants being an arrestee who has been allowed to enter the premises; and the officer makes observations of contraband in plain view and such observations are apparent to the occupants of the premises; do "exigent circumstances" exist which would permit the officer to enter the premises under an "exigency exception" to the Fourth Amendment warrant requirement?

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OPINION OF WASHINGTON STATE SUPREME COURT

State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980)

STATEMENT OF CASE

On November 26, 1980, the Washington State Supreme Court entered judgment in the above-entitled matter reversing the Whitman County Superior Court and the Washington State Court of Appeals. A Motion for Rehearing (Motion for Reconsideration) was timely filed, and denied by the Washington State Supreme Court on December 31, 1980.

The case entails an interpretation of the Fourth Amendment to the United States Constitution and its application to the states through the Fourteenth Amendment. The case deals with both the right of a law enforcement officer to accompany an arrestee onto premises when the arrestee voluntarily returns to the premises and what constitutes "exigent circumstances" as a matter of constitutional law. The Washington State Supreme Court

has ruled in effect that if the arrestee requests to return to his premises, that the law enforcement officer may not accompany the arrestee onto the premises without first complying with the warrant requirements of the Fourth Amendment to the United States Constitution. Also, the court found as a matter of law that exigent circumstances did not exist. Therefore, the court reasoned that since the officer did not have a right to be where he was on the premises, that any of his observations were not covered by the "plain view" exception to the warrant requirement and therefore the evidence of contraband derived thereafter should be suppressed as fruit of an illegal search and seizure; that is, that there was no prior justification for the intrusion onto the premises by the officer even in light of the arrest status of the arrestee and

the arrestee's voluntary return to the premises and the officer's probable cause observations from outside the premises. The court held that the arrest status of the individual did not give the officer, in the absence of a warrant, the right to accompany the arrestee and enter the room where he seized the contraband in plain view. Additionally, the court held that even though the officer was standing immediately outside the premises in a doorway of the premises and his presence was known to both the occupants, one of the occupants being an arrestee who had been allowed to enter the premises, and the officer made observations of contraband in plain view and such observations were apparent to the occupants of the premises, that there was no showing of an "exigency exception" to the Fourth Amendment which would have allowed the officer to enter

the premises.

Supreme Court Rule 17 governing the consideration for review by certiorari indicates that when a state court has decided a federal question of substance not previously determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court, or when a state court of last resort has decided a federal question in conflict with the decision of another state court of last resort, then a Writ of Certiorari would be appropriate. The issues presented in this case fall within the provisions of Rule 17 and review by this Court would be proper.

As to the first question presented for review it is noted that the authority of an officer to accompany an arrestee onto premises involves a substantial federal question and the decision of the

Washington Supreme Court creates a direct conflict with other jurisdictions, the State of Alabama and the State of Illinois. In addition, the decision involves a question of interpretation of the Fourth Amendment of the United States Constitution which has not previously been determined by this court.

The Alabama Supreme Court in Moffett v. State, 291 Ala. 382, 281 So.2d 630, 632 (1973), cert. denied 414 U.S. 1161 (1974), held that an officer was permissibly in the bedroom and the seizure of the pistol in plain view was permissible since the officer had a right to be where he was, tacitly approving the officer's ability to accompany an arrestee to another portion of the premises. Moffett involved a situation where the defendant was arrested without a warrant at the door of his premises and requested of the

officer that he be permitted to go into the bedroom on the premises where he was allowed to go but was followed and accompanied by the arresting officer. After entering the bedroom, the officer saw a pistol in plain view. Additionally in People v. Green, 141 Ill.App.3d 972, 304 N.E.2d 32, 40 (1973), cert. denied 417 U.S. 972 (1974), the Illinois court allowed an officer to accompany a defendant onto the premises (his YMCA room) when the defendant asked to be allowed to voluntarily return to the premises. It is noted that the Washington Supreme Court majority opinion cited no direct authority for its position on this issue (see dissenting opinion which cites ample contrary authority).

Therefore, the Petitioner is asking that this Court review the Fourth Amendment requirements as to search and seiz-

ure and determine when and how those rights attach in determining whether or not an officer may accompany an arrestee onto premises when the arrestee has requested and been allowed to voluntarily return to the premises while the arrest status continues.

As to the second question presented for review, it is a question of substance which has not specifically been determined by this Court. However, the decision of the Washington Supreme Court appears not to be in accord with the applicable decisions of this Court which indicate that exigent circumstances may exist which would allow warrantless entry when it is impractical to acquire a warrant from an impartial magistrate and the officer otherwise has probable cause justifying a search and seizure; see Colorado v. Bannister, ___U.S.___, ___L.Ed.2d ___,

101 S.Ct. 42, 44 n.4 (1980); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); and Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925). Additionally, the Washington Supreme Court appeared to have decided this federal question in conflict with the decision of another state court of last resort. The Nebraska State Supreme Court has ruled in State v. Patterson, 192 Neb. 308, 220 N.W.2d 235, 240 (1974), that where the information in possession of the officer leads to the conclusion that a crime is being committed in the residence and the officer has evidence which indicates that there is a great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist.

Therefore it is submitted that the question of whether or not the facts of

the case constitute "exigent circumstances" which would constitutionally permit a warrantless entry and seizure of contraband viewed by the officer should be resolved by review of this question by this Court.

As to both questions presented for review, the Fourth Amendment to the United States Constitution states the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The facts of this particular case are as follows: On the evening of January 21, 1978, Mr. Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University with several student friends on their way to

a party (RP p.3, ln. 25-26). At that moment Officer Daugherty of the Washington State University Police Department arrived at the dorm to investigate an unrelated matter (RP p.3, ln. 5, 13, 19). The officer noticed the bottle of gin and suspected that Mr. Overdahl, because of his youthful appearance, was under the age of twenty-one (RP p.4, ln. 15; RP p.6, ln. 5). He stopped Mr. Overdahl, detained him, and requested identification (RP p.5, ln. 18; RP p.57, ln. 2-4; RP p.5, ln. 3). Mr. Overdahl stated that he would have to go upstairs to his room to get the identification. Officer Daugherty indicated that since he was under his detention, he would not allow him to leave without an officer accompanying him to his room (RP p.5, ln. 22-26; RP p.35, ln. 17-18; RP p.6, ln. 8-12). As they were waiting for the elevator, the officer asked Mr.

Overdahl how old he was. Mr. Overdahl responded that he was nineteen (RP p.6, ln. 10-12).

Upon arriving on the eleventh floor of the dormitory, Officer Daugherty followed Mr. Overdahl down the hallway to his room (RP p.7, ln. 12-14; RP p. 59, ln. 28). Mr. Overdahl pushed open the slightly ajar door and entered an approximately 17' x 11' room. The officer stood in the doorway out in a common public hallway (without entering the premises)(RP p. 7, ln. 28-30; RP p.8, ln. 8-13; RP p.21, ln. 26-28; CP p.18, ln. 10-18; CP p.14, ln. 8-34; RP p. 19, ln. 15-28; RP p.43, ln. 5-30; and RP p.44, ln. 1) and noticed that the room was occupied by another student, Neil Chrisman, the respondent herein. Officer Daugherty testified that Mr. Chrisman appeared visibly nervous upon seeing the police officer (RP p.9, ln. 11-12;

RP p.10, ln. 11-13; RP p.10, ln. 30; RP p.12, ln.8; and RP p.12, ln. 11-14).

After watching the occupants for a short time, Officer Daugherty observed seeds and a pipe lying on a desk eight to ten feet from where he was standing. Based upon his training and experience he immediately recognized the items as contraband (prior to entering the premises). He therefore entered the room and proceeded to examine the seeds and pipe more closely (RP p.13, ln. 26-27; RP, p.17, ln. 2-6; and RP p.18, ln. 27-30). After completing his inspection, he again concluded that the items were contraband and gave the two students their Miranda rights (RP p.19, ln. 28-29; RP p.20, ln. 1-4). Both Mr. Overdahl and Mr. Chrisman indicated that they understood their rights and were willing to waive them (RP p.23, ln. 23-28; RP p.24, ln. 21-22). The officer asked

them if there were any other drugs in the room and Mr. Chrisman handed him a box containing three bags of marijuana (Finding of Fact as to Mr. Chrisman No. 18; Finding of Fact and Motion to Suppress No. 10).

Officer Daugherty radioed for assistance and Officer Kenny arrived shortly thereafter. Officer Kenny informed Mr. Chrisman and Mr. Overdahl that a search of their room was necessary. He explained that they had an absolute right to demand that the police obtain a search warrant, which would take about two hours, or they could consent to a search of their room. He further explained that their consent must be voluntary and that they had a right to refuse consent (RP p.62, ln. 5-25). After conferring in whispers, Mr. Overdahl and Mr. Chrisman agreed to the search (RP p.64, ln. 16-30; RP p.65, ln. 1-6). Prior to signing a

written consent to search form, Mr. Chrisman and Mr. Overdahl were again advised of their Miranda rights. A search of the room yielded more marijuana and also LSD.

Mr. Chrisman and Mr. Overdahl were charged by information with one count of felony possession of marijuana and felony possession of LSD. Prior to the trial, a suppression hearing was held and the defendants moved to suppress all evidence on the basis that all the evidence was tainted as a result of an illegal search and seizure. The trial judge denied the motion. Mr. Chrisman and Mr. Overdahl were tried without a jury and convicted as charged. This conviction was appealed to the Washington State Court of Appeals. In a published opinion the Court of Appeals upheld the defendants' convictions (State v. Chrisman, 24 Wn.App. 385, 600 P.2d 1316 (1979)). The Court of Appeals

indicated that the officer's observation of the contraband in the room and Mr. Chrisman's reaction to the officer's presence were such that if the officer had left the premises immediately after observing the seeds and pipe in an attempt to secure a search warrant, the contraband would likely have been removed during the interim and additionally because drugs are readily disposable, there were sufficient exigent circumstances existing to justify the warrantless search of the room; the drugs permissibly having come into the officer's "plain view". Mr. Chrisman and Mr. Overdahl then filed a Motion for Reconsideration which was denied on the 4th day of December, 1979.

Both defendants then appealed to the Washington State Supreme Court alleging that the seizure was the product of a warrantless search. On March 31, 1980

the Superior Court dismissed the felony probation and expunged the conviction of Mr. Overdahl to facilitate his entry into an advanced Army ROTC program, therefore this petition only concerns Mr. Chrisman. The dismissal was upon joint motion of the petitioner herein and Mr. Overdahl through his legal counsel.

On November 26, 1980 the Washington State Supreme Court ruled in respondent Chrisman's favor and found (see comments in dissenting opinion) that the officer could not enter the room without a warrant even to accompany an arrestee who had requested to be allowed and had been allowed to voluntarily return to the room in question and additionally found that at the time of the officer's entry into the room that there were no exigent circumstances that justified a warrantless entry, rejecting the application of "plain

view" and the applicability of the exception to the warrant requirement for exigent circumstances.

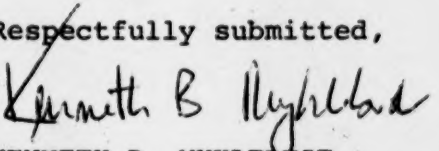
Although the Washington State Supreme Court Opinion indicates exigencies were not argued, this is an apparent reference to exigencies other than the observations made by the officer outside the room, since the court declined to decide where the officer was originally located, labeling such as "niceties" (page 5 of the court's opinion). There is no question that exigencies were argued by the petitioner at every stage of the proceedings in this matter (State's Trial Brief at Superior Court, filed the 20th day of March, 1978, p. 3-6; Trial Court's Findings of Fact, CP p. 23-27; Superior Court's Memorandum Opinion on exigent circumstances to justify entry into the room, CP p.19, ln. 31-32; CP p.20, ln. 1-6;

State's original brief to appellate court, p. 18-20; Court of Appeals Opinion at p. 390 accepting the State's argument concerning exigent circumstances, State v. Chrisman, 24 Wn.App. 385, 600 P.2d 1316 (1979); and State's Answer to Defendant's Motion for Discretionary Review to Washington State Supreme Court, p. 1-5).

The Petitioner is alleging that the ruling of the Washington State Supreme Court is in error, in conflict with the above cited case authority and presents issues which have not been previously ruled on by this Court, and that the ruling of the Washington State Supreme Court has erroneously held that an officer may not accompany an arrestee who has requested and been allowed to voluntarily return to the premises and that there were no exigent circumstances to justify the entry of the officer onto the premises

without a warrant. Therefore this matter should be reviewed by this Court.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	Nos. 2959-III and 2991-III
v.	)	Division Three
NEIL MARTIN CHRISMAN and CARL PHILIP OVERDAHL, Appellants.	)	FILED Oct 4 1979

MITCHELL, J.*--On the evening of January 21, 1978, Carl Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University on his way to a party with several of his student friends. At that moment, Officer Daugherty of the Washington State University police department arrived at Orton Hall to investigate an unrelated matter. Officer Daugherty noticed the half gallon of gin

*Judge James B. Mitchell is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

and suspected that Overdahl was under the age of 21. The officer stopped Overdahl and asked him for his identification. Overdahl replied that he did not have his identification with him and would have to go upstairs to his room and get it. Overdahl asked the officer if he would wait; the policeman said that under the circumstances, he would have to accompany Overdahl to his room.

While they were waiting for the elevator, the officer asked the student how old he was; he said he was 19. Upon arriving at the eleventh floor, the officer followed Overdahl down the hallway to his room. The door was slightly ajar; Overdahl pushed the door open and entered the approximately 17 by 11 foot room. Officer Daugherty leaned against the doorjamb in the open doorway. At the same time, he noticed that the room was occu-

pied by another student, Neil Chrisman, who appeared visibly nervous upon seeing the police officer.

Officer Daugherty watched the two occupants for a few moments before he saw a tray on a desk 8 to 10 feet from where he was standing; the tray contained seeds. A small pipe lay nearby which his experience led him to believe was used for smoking marijuana. At that point, Officer Daugherty entered the room, walked over and examined the seeds and pipe to verify that what he had been observing was marijuana. For the first time, he gave both Chrisman and Overdahl their Miranda rights. They told the officer they understood their rights and agreed to waive them.

The officer then asked them if they had other drugs in the room; Chrisman handed him a small box containing three

plastic baggies of marijuana. Officer Daugherty then called another police officer who arrived shortly thereafter. The officers explained to Overdahl and Chrisman that a search of their room was necessary and they could either consent or the officers would have to get a search warrant. The explanation was given in considerable detail and after it was over, the two students conferred in whispers between themselves for several minutes before giving their consent. The officers again gave them their Miranda rights; both students signed written consent forms prior to the search of the room. The search yielded more marijuana and also LSD.

Chrisman and Overdahl were tried without a jury and convicted of possession of more than 40 grams of marijuana. Neil Chrisman was convicted on a second

count of possession of LSD. Prior to trial, a suppression hearing was held. The trial judge denied defendants' motion to suppress. Both defendants appeal. We affirm.

Overdahl contends that Officer Daugherty was required to give him his Miranda rights before asking for proof of his age since the officer suspected him of being a minor in possession and being underage is an element of that crime. Overdahl further contends that because the officer elicited the incriminating information that he was underage prior to giving him his Miranda rights, the officer did not have a justifiable reason for being in the doorway of the room where he observed the drugs, thus the drugs should have been suppressed. We disagree.

The trial judge found that Officer

Daugherty had properly placed Overdahl under arrest for minor in possession and was therefore entitled to accompany Overdahl to his room. An officer may arrest for a misdemeanor committed in his presence and the fact that a defendant is later formally charged with another offense does not invalidate an otherwise lawful arrest. City of Spokane v. Badeaux, 20 Wn. App. 731, 734, 581 P.2d 1088 (1978). Overdahl makes no allegation that the detention was an illegal arrest. See State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977). As a general rule, incriminating statements made and evidence then subsequently seized while a person is in custody before he has been advised of his Miranda rights are inadmissible. State v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976); State v. Galloway, 14 Wn. App. 200, 540 P.2d 444 (1975). Cf. State v.

Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977); State v. McKeown, 23 Wn. App. 582, 596 P.2d 1100 (1979). Since Overdahl was neither charged with nor tried for the offense of being a minor in possession, his statement to the officer regarding his age was immaterial. Evidence of his age had no bearing on the charge for which he was convicted. We find Overdahl was in lawful custody; and, therefore, Officer Daugherty's accompanying Overdahl to his room was proper and the officer's presence justifiable.

Overdahl argues that Officer Daugherty's entry into his room was an unjustifiable intrusion which does not come within any exception to the requirements of the Fourth Amendment. However, since Overdahl was in custody, Officer Daugherty had a duty to accompany him to his room.

His presence in the doorway was proper. It is undisputed that Mr. Overdahl pushed the door open and entered the room. In order to keep Overdahl within his view, the officer stood in the doorway looking into the room. There is no suggestion that Overdahl attempted to close the door once he had entered. Prior to entering the room, the officer saw from his vantage point in the doorway what he believed was contraband. Only at that time, did he cross the threshold and seize the pipe and marijuana seeds.

The circumstances here bear a close resemblance to State v. Daugherty, 22 Wn. App. 442, 591 P.2d 801 (1979), and the rationale in that case is applicable. The police suspected that Daugherty had burglarized a safe. The police went to Daugherty's home and walked into the middle of his driveway. One police

officer looking through the open garage doors into the garage saw an object that resembled a safe, partially covered by a tarpaulin. The officers arrested Daugherty, then entered the garage and seized the safe. The court held that Daugherty's driveway was only semi-private and not a constitutionally protected area. Therefore, the officer's observation of the safe from the driveway was not an intrusion upon a constitutionally protected area; he inadvertently "saw the safe in 'open view' and immediately recognized its significance." State v. Daugherty, supra at 444. The seizure of the safe "followed a preintrusion 'open view' observation, in contrast to a post-intrusion 'plain view' observation." State v. Daugherty, supra at 445. The court held, however, that since the safe was not the type of evidence which could be readily destroyed,

no exigent circumstances existed which permitted a warrantless seizure.

As in the above case, Officer Daugherty's observation of the pipe and seeds was a preintrusion "open view" observation from the doorway of Overdahl's room which, like the driveway in State v. Daugherty, supra, was a semi-private area. Unlike the facts in Daugherty, exigent circumstances existed here. Because the drugs could have been readily disposed of while the police officer was trying to obtain a search warrant, sufficient exigent circumstances existed to justify the seizure. The warrantless seizure of drugs which comes within an officer's plain view has been upheld as reasonable. State v. Dickamore, 22 Wn. App. 851, 592 P.2d 681 (1979); State v. Brown, 17 Wn. App. 587, 564 P.2d 342 (1977); State v. Campbell, 15 Wn. App. 98, 547 P.2d 295

(1976); State v. Campbell, 13 Wn. App. 722, 537 P.2d 1067 (1975).

Overdahl and Chrisman next assert that Officer Daugherty was required to knock and announce prior to his entry into the room. RCW 10.31.040 requires that police in carrying out searches or arrests must knock, announce and wait for refusal before making a forcible entry into a residence. State v. Edwards, 20 Wn. App. 648, 581 P.2d 154 (1978); State v. Talley, 14 Wn. App. 484, 543 P.2d 348 (1975). The purpose underlying the knock-and-announce rule is to prevent unnecessary violence, physical destruction of property and unreasonable intrusions into private residences. State v. Hilliard, 18 Wn. App. 614, 570 P.2d 160 (1977). However, strict compliance with the knock-and-announce rule will be excused "when to knock and announce would be to perform a useless

act, . . . or allow the destruction of evidence." State v. Campbell, 15 Wn. App. 98, 101, 547 P.2d 295 (1976). Here, where the police officer was standing in an open doorway with the full knowledge of both occupants, strict compliance with the knock-and-announce rule would have been a useless act.

Finally, Overdahl and Chrisman argue that their consent to search was not validly given. We find no merit to this contention. After Officer Daugherty seized the pipe and marijuana seeds, he immediately advised Chrisman and Overdahl of their Miranda rights. Chrisman then gave the officer additional contraband after he had been advised of his rights. His act of giving the officer more drugs was a testimonial act which required his being advised of his rights. He was so advised and waived those rights. Cf. State

v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976). There is nothing in the record to suggest coercion. In fact, the officers called in a resident adviser as a witness in order to avoid just such an accusation. Overdahl and Chrisman conferred at some length about giving their consent to the search and signed written consent forms to that effect. Although written consent is not required, the forms are indicia of a voluntary consent. See State v. Rodriguez, 20 Wn. App. 876, 582 P.2d 904 (1978). We find both students validly and voluntarily consented to the search.

Judgment affirmed.

s/ Mitchell, J.

WE CONCUR:

s/ McInturff, J.

s/ Green, C.J.

APPENDIX B

[No. 46750. En Banc. November 26, 1980.]

THE STATE OF WASHINGTON, *Respondent*, v. NEIL MARTIN CHRISMAN, ET AL, *Petitioners*.

[1] Searches and Seizures — Warrantless Search — Validity — In General. A warrantless search is not valid unless it comes within one of the specific and carefully delineated exceptions to the Fourth Amendment warrant requirement.

[2] **Searches and Seizures — Objects in Plain View — Prior Justification for Intrusion.** A search does not fall within the plain view exception to the warrant requirement unless the State can show a prior justification for the intrusion into the area where the incriminating evidence was inadvertently discovered.

[3] **Searches and Seizures — Warrant — Purpose — In General.** The search warrant requirement of the Fourth Amendment is designed primarily to protect individuals from unjustifiable intrusions into their dwellings or living quarters.

[4] **Searches and Seizures — As Incident to Arrest — Exigent Circumstances — What Constitutes.** The validity of a search incident to an arrest depends upon the existence of exigent circumstances such as a need to seize weapons which could be used in an assault or to effect an escape or a need to prevent the destruction of evidence of the crime.

[5] **Searches and Seizures — Illegal Search — Effect.** Evidence obtained by virtue of information acquired during an illegal search is generally not admissible.

BRACHTENBACH, STAFFORD, and HOROWITZ, JJ., dissent by separate opinion.

Nature of Action: After arresting a college student for possessing intoxicating liquor, a police officer accompanied the student to his dormitory room, observed a pipe and marijuana seeds, arrested his roommate, and made a warrantless search of the room.

Superior Court: The Superior Court for Whitman County, No. C-1799, Philip H. Faris, J., entered a judgment of guilty against the roommate on July 21, 1978.

Court of Appeals: The court *affirmed* the judgment at 24 Wn. App. 385, holding that exigent circumstances justified the police intrusion into the room.

Supreme Court: Holding that the police intrusion into the room was not justified under the circumstances, the court *reverses* the decision of the Court of Appeals.

Aitken, Schauble, Patrick, Neill & Charawell, by *Robert F. Patrick*, for petitioner Chrisman.

Stephen Bishop, for petitioner Overdahl.

Ronald R. Carpenter, Prosecuting Attorney, and *Gerald R. Fuller, Deputy*, for respondent.

DOLLIVER, J.—Defendants Carl Overdahl and Neil Chrisman, students at Washington State University, were tried without a jury and convicted of possession of more than 40 grams of marijuana, a felony. Chrisman was also convicted of possession of lysergic acid diethylamide (LSD). Both defendants appealed and the Court of Appeals affirmed their convictions. *State v. Chrisman*, 24 Wn. App. 385, 600 P.2d 1316 (1979). They then petitioned this court for review. The charges against Overdahl, however, were subsequently dismissed, and he withdrew his petition for discretionary review. We accepted review of Chrisman's conviction (93 Wn.2d 1009 (1980)), and reverse.

On the evening of January 21, 1978, defendant Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University with several student friends on their way to a party. At that moment, Officer Daugherty of the University police department arrived at the dormitory to investigate an unrelated matter. The officer noticed the bottle of gin and suspected that Overdahl was under the age of 21. He stopped Overdahl and requested his identification. Overdahl stated that he would have to go upstairs to his room to get the identification. Officer Daugherty replied that he would have to accompany him to his room. As they were waiting for the elevator, the officer asked Overdahl how old he was. Overdahl responded that he was 19.

Upon arriving on the 11th floor of the dormitory, Officer Daugherty followed Overdahl down the hallway to his room. Overdahl pushed open the slightly ajar door and entered the approximately 17- by 11-foot room. The officer stood in the open doorway and noticed that the room was occupied by another student, defendant Neil Chrisman. Officer Daugherty testified that Chrisman appeared visibly nervous upon seeing the police officer.

After watching the occupants for a few minutes, Officer Daugherty observed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing. He recognized the pipe as the type used for marijuana, and proceeded to examine the seeds and the pipe more closely.

Concluding that the seeds were marijuana and that the pipe smelled of marijuana, Officer Daugherty gave the two students their *Miranda* rights. Both Overdahl and Chrisman indicated they understood their rights and were willing to waive them. The officer then asked them if they had other drugs in the room and Chrisman handed him a small box containing three small plastic bags of marijuana.

Officer Daugherty radioed for assistance and Officer Kenny arrived shortly thereafter. Officer Kenny informed the defendants that a search of their room was necessary. He explained that they had an absolute right to demand that the police obtain a search warrant which would take about 2 hours, or alternatively they could consent to a search of their room. He further explained that their consent must be voluntary and that they had a right to refuse consent. After conferring in whispers, Overdahl and Chrisman agreed to the search. Prior to signing written consent to search forms, defendants were again advised of their rights under *Miranda*. A search of the room yielded more marijuana and also LSD.

Chrisman and Overdahl were charged by amended information with one count of possession of more than 40 grams of marijuana. Chrisman was also charged with a second count of possession of LSD. Prior to trial, a suppression hearing was held and defendants moved to suppress all evidence on the basis that the evidence was obtained as a result of an illegal search and seizure. The trial judge denied the motion. Defendants were tried without a jury and convicted as charged.

[1] Chrisman contends that Officer Daugherty's initial warrantless examination of the seeds and the pipe amounted to an unconstitutional search and that the evidence seized should have been suppressed. We agree.

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

(Footnote omitted.) *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980). Since Officer Daugherty had no warrant when he entered Chrisman's and Overdahl's room, the search was proper only if it fell within one of the "jealously and carefully drawn" exceptions to the warrant requirement of the Fourth Amendment. *Jones v. United States*, 357 U.S. 493, 499, 2 L. Ed. 2d 1514, 78 S. Ct. 1253 (1958); *State v. Daugherty, supra*.

[2, 3] The State asserts that the seizure of the marijuana seeds and pipe was permissible under the "plain view" exception to the warrant requirement. This exception permits warrantless seizure of incriminating evidence discovered in a search of a given area for other specified items pursuant to a valid warrant, or discovered inadvertently after an intrusion otherwise excepted from the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971); *State v. Daugherty, supra*.

The plain view exception will apply only if the following requirements are met: (1) a prior justification for intrusion; (2) inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the officer that he had evidence before him. *State v. Daugherty, supra; State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974), *cert. denied*, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975); *State v. Dimmer*, 7 Wn. App. 31, 33, 497 P.2d 613, *review denied*, 81 Wn.2d 1003 (1972). The burden falls on the State to show that a warrantless search falls within the plain view exception to the warrant requirement. *See Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979); *State v. Daugherty, supra*. A greater burden is placed on officials who enter a home or dwelling without a warrant. The

"'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v. New York*, ___ U.S. ___, 63 L. Ed. 2d 639, 100 S. Ct. 1371, 1380 (1980), quoting *United States v. United States District Court*, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972).

Some argument is made by defendant that in fact Officer Daugherty was not in the room at the time he observed the seeds and pipe but was standing only in the doorway. The record is in conflict as to whether Officer Daugherty stood in the doorway and then entered the room or whether, while in the doorway, he was in fact in the room. We need not, however, let the result be determined by such niceties. The police officer was in the room at the time he observed the seeds and pipe. The question is: Did he have a right to be there?

We begin by stating the trial court correctly determined Overdahl had been placed under arrest at the time he was apprehended outside Orton Hall carrying the bottle of gin. Overdahl continued to be under arrest when he was accompanied to his room by Officer Daugherty. As the State observes, there was nothing to prevent Officer Daugherty from accompanying Overdahl to his room. Simply because Overdahl was under arrest, however, did not give Officer Daugherty the right to enter the room and, upon seeing the seeds and pipe, to conduct a search—all without a warrant.

One of the difficulties in this case results from the fact that the focus has been on the marijuana rather than the alcohol. But, as the State claimed and the trial court concluded, we concur that the entry into the room was connected with the arrest for possession of alcohol by a minor, and not the possession of marijuana. Once Officer Daugherty entered the room as he followed up on the alcohol arrest, the validity of his observation of the seeds and pipe and the subsequent search depends on the constitutionality of the original entry.

[4] The United States Supreme Court has consistently held a contemporaneous search is justified by such exigent circumstances as,

> the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control.

Chimel v. California, 395 U.S. 752, 764, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969), quoting from *Preston v. United States*, 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881 (1964). This case does not fit under the contemporaneous search exceptions.

It is clear from the testimony of Officer Daugherty that the only reason he accompanied Overdahl to the room was so that Overdahl could get his identification. Officer Daugherty said at the time he stopped Overdahl he "believed that I had a minor in possession" and that Overdahl could not go to his room alone to get the identification "because we just don't release people from custody." The arrest of Overdahl was for a minor in possession of alcoholic beverages. There is absolutely no evidence that it was necessary for Officer Daugherty to enter the room to seize a weapon which might be used in an assault, that the bottle of gin was about to be destroyed, or that Overdahl was going to attempt an escape. It was a small room. Officer Daugherty was standing in the one exit, and it was on the 11th story. It was not necessary for the officer to enter the room to make certain Overdahl secured his identification. No exigent circumstances existed to justify this intervention; nor were any claimed by the State.

The circumstances were insufficient to justify an intrusion into Chrisman's room, and therefore the first prong of the plain view doctrine has not been met. Accordingly, there is no need to determine whether the final two requirements have been fulfilled as all three elements must be met before the plain view doctrine applies. *See State v.*

Daugherty, supra. The seeds and the pipe were products of an unlawful search, and the motion to suppress the evidence should have been granted.

[5] The marijuana and LSD seized after Chrisman and Overdahl consented to a search of their room also should have been suppressed. Evidence obtained through exploitation of an illegal search is not admissible. *United States v. Crews*, ___ U.S. ___, 63 L. Ed. 2d 537, 100 S. Ct. 1244 (1980); *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Defendants' consent to search the room following the seizure was voluntary only if obtained "by means sufficiently distinguishable to be purged of the primary taint" rather than "by the exploitation of that illegality" (*Wong Sun*, at 488), such as when a significant intervening event or a considerable lapse of time separates the two. *Wong Sun*, at 485–91; *State v. Byers*, 88 Wn.2d 1, 8, 559 P.2d 1334 (1977). *See United States v. Crews, supra.*

In the present case, the causal chain is short and unbroken. There was no lapse of time or significant intervening event between the unconstitutional entry into the room and Chrisman's consent to search. We hold defendant's consent was the product of an illegal search and thus involuntary. All of the contraband seized must be excluded.

Reversed.

UTTER, C.J., and ROSELLINI, HICKS, and WILLIAMS, JJ., concur.

BRACHTENBACH, J. (dissenting)—I dissent. The officer had in custody an admitted minor in possession of alcohol. The minor initiated the journey to his room to obtain identification.[1]

The majority holds that the plain view exception fails because the officer did not have a prior justification for the

[1]This is not a case where the police arrested a defendant outside his home and then took him inside for the purpose of conducting a warrantless search of his dwelling. *Shipley v. California*, 395 U.S. 818, 23 L. Ed. 2d 732, 89 S. Ct. 2053 (1969).

intrusion. What the majority fails to explain convincingly is why the officer was not entitled to keep the arrested person within his sight. The majority's conclusion does not rest upon any cited authority, but only upon its bare assertion. That conclusion is inconsistent with existing precedent, which indicates the officer was entitled to be where he was. Given this right, all elements of the plain view doctrine were satisfied.[2]

State v. Brown, 132 N.J. Super. 180, 333 A.2d 264 (1975), is precisely on point and contrary to the majority. Defendant was arrested in a motel parking lot on drug charges, and asked if he could go to his motel room to get his jacket. The police consented and accompanied defendant to his room. Upon entry, the police observed in plain view what they believed to be illegal drugs. The appellate division held that the drugs were admissible because considerations of police safety and prevention of a possible escape gave the police the right to enter defendant's room. The possibility of escape was admittedly remote in the present case, but concern for police safety was no less compelling than in *Brown*.

Other cases indicate that if a defendant is arrested at his dwelling and asks for access to some other room, the police may search that room before or after granting his request. *United States v. Mason*, 523 F.2d 1122, 1126 (D.C. Cir. 1975); *United States v. Wright*, 577 F.2d 378, 381 (6th Cir. 1978); *United States v. DeMarsh*, 360 F. Supp. 132, 137 n.4 (E.D. Wis. 1973); *see* Kelder, *Criminal Procedure*, 30 Syracuse L. Rev. 15, 68 (1979). If Officer Daugherty had the right to search defendant's room, he obviously had the right to enter it.

A host of cases hold that if a defendant is arrested at his dwelling, and is allowed to go to another part of it for some

[2]The majority correctly notes that the plain view doctrine is applicable only if the police inadvertently observe what they immediately know is evidence from a place they are entitled to be. The "inadvertence" and "immediate knowledge" requirements were clearly satisfied in this case.

purpose, the police may accompany the defendant there and any evidence they inadvertently observe is admissible under the plain view doctrine. *See, e.g., United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977) (officer could accompany defendant to another room "to maintain a 'watchful eye' on her and to assure that she did not destroy evidence or procure a weapon"); *Moffett v. State*, 291 Ala. 382, 281 So. 2d 630 (1973), *cert. denied*, 414 U.S. 1161, 39 L. Ed. 2d 114, 94 S. Ct. 924 (1974); *People v. Stevens*, 38 Cal. App. 3d 66, 113 Cal. Rptr. 49 (1974); *People v. Green*, 14 Ill. App. 3d 972, 304 N.E.2d 32 (1973), *cert. denied*, 417 U.S. 972, 41 L. Ed. 2d 1143, 94 S. Ct. 3179 (1974); *People v. Mann*, 61 Misc. 2d 107, 113, 305 N.Y.S.2d 226 (1969) ("certainly reasonable" for police to accompany defendant to bedroom and "keep him under continuous surveillance while he was putting on his clothing"); 2 W. LaFave, *Search and Seizure* § 6.4, at 420–21 (1978).

In all of the cases cited above, except *Brown*, the defendant was allowed to move about after being arrested in his dwelling, as contrasted to being arrested outdoors as in the present case. This is not a difference of constitutional magnitude which distinguishes the cited cases from the present case. The focus of those cases was not on the locus of arrest, but rather on the reasonableness of searching the room an arrestee requests to enter, or the reasonableness of accompanying an arrestee when he is permitted to move about his dwelling. The rationale of those cases (concern for police safety, avoiding possible destruction of evidence, and discouraging potential escape attempts), which found such police conduct reasonable, is equally persuasive when an arrestee outside his dwelling requests to enter it. As the arrestee moves about of his own volition, whether from one area of his dwelling to another or from outside his dwelling to inside it, the right of the police to make plain view seizures must necessarily expand correspondingly. *See* Kelder, *supra* at 68; *United States v. Griffith*, 537 F.2d 900, 905 (7th Cir. 1976); *United States v. Mason*, 523 F.2d 1122, 1125–26 (D.C. Cir. 1975) (by implication). I would hold

that, as a general rule, "[w]here a person in custody asks to be given access to an area, he has no basis to object that the arresting officers" (*Mason, supra* at 1126) accompany him to that area and keep him in view.

The officers meticulously observed the defendants' *Miranda* rights and advised both defendants of their absolute right to require a search warrant. They were advised that their consent must be voluntary and that they had a right to refuse consent. After conferring, the defendants consented to the search.

I would affirm the decisions of the trial court and the Court of Appeals.

STAFFORD and HOROWITZ, JJ., concur with BRACHTENBACH, J.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	)	
v.	)	MANDATE
NEIL MARTIN CHRISMAN and CARL PHILIP OVERDAHL, Petitioners.	)	No. 46750-1 WHITMAN County No. C-1799 Court of Appeals No. 2991-III

The State of Washington to: The Superior Court of the State of Washington

in and for WHITMAN County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 26, 1980, became the decision terminating review of this court in the above entitled case on December 31, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceed-

ings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:
$25.00 in favor of petitioners and against respondent.

An Order Denying Motion for Reconsideration was entered December 31, 1980; copy attached.

cc:
Aitken, Schauble, Patrick,
Neill & Charawell
Mr. Robert F. Patrick
Mr. Stephen Bishop
Hon. Ronald R. Carpenter
Whitman County Prosecutor
Mr. Gerald R. Fuller, Deputy
Reporter of Decisions
Court of Appeals, Div. III

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 8th day of January, A.D. 1981.

/s/ John J. Champagne
JOHN J. CHAMPAGNE
Clerk of the Supreme Court,
State of Washington

Attached
cl

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

NEIL MARTIN CHRISMAN, ET AL,

Petitioners.

No. 46750

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by a vote of 5 to 3 that the respondent's motion for reconsideration should be denied,

It is order that the motion be and it hereby is denied.

Dated this 31st day of December, 1980.

/s/ Robert F. Utter
Chief Justice

94 Wn.2d 711

No. 80-1349

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

PETITIONER,

v.

NEIL MARTIN CHRISMAN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEB. 10, 1981
CERTIORARI GRANTED JUNE 22, 1981

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear as appendices starting on the following pages of the Petition for Certiorari:

Opinion of the Washington State Court of Appeals, filed on October 4, 1979, 20

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 6, 1978 - Information for Possession with Intent to Deliver a Schedule I Controlled Substance (Marijuana) and Possession of a Schedule I Controlled Substance (Lysergic Acid Diethylamide), filed in the Superior Court for the State of Washington, in and for Whitman County, Colfax, Washington.

March 20, 1978 - Plaintiff's (State's) Memorandum of Authorities Regarding Suppression Hearing, filed in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington.

March 23, 1978 - Defendant's Motion to Suppress Evidence, filed in the Superior Court for the State of Washington, in and for Whitman County, Colfax, Washington.

March 23, 1978 - Defendant filed Suppression Hearing Brief in the Superior

Court for the State of Washington, in and for Whitman County, Colfax, Washington.

March 24 and 29, 1978 - Testimony and Argument on Motion to Suppress before the Whitman County Superior Court.

April 11, 1978 - Amended Information for Possession of More Than 40 Grams of the Schedule I Controlled Substance (Marijuana) and Possession of Schedule I Controlled Substance (Lysergic Acid Diethylamide) filed in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington.

April 17, 1978 - Memorandum Opinion of the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington, filed by the court.

April 17, 1978 - Findings of Fact and Conclusions of Law (as to suppression motion), filed in the Superior Court of the State of Washington, in and for Whitman

County, Colfax, Washington.

May 22, 1978 - Defendant's Supplemental Memorandum in Support of Defendant Chrisman's Motion to Suppress, filed in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington.

May 22, 1978 - Defendant filed Motion to Suppress in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington.

May 22, 1978 - Defendant filed a Waiver of Right to a Jury Trial in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington 99111

May 22, 1978 - Defendant was tried before the court and found guilty.

July 21, 1978 - Defendant was sentenced and an Order Granting Probation entered on his conviction for Possession of More Than 40 Grams of Marijuana and Possession of LSD, Count I and Count II of the Amended Information, in the Superior Court of the State of

Washington, in and for Whitman County, Colfax, Washington.

July 24, 1978 - Defendant filed a Notice of Appeal to the Court of Appeals in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington.

November 6, 1978 - A Narrative Supplement to the Verbatim Record of Proceedings was filed in the Superior Court of the State of Washington, in and for Whitman County, Colfax, Washington.

October 4, 1979 - Washington State Court of Appeals, Division III, Spokane, Washington filed its Opinion.

October 24, 1979 - Defendant filed a Motion for Reconsideration in the Washington State Court of Appeals, Division III, Spokane, Washington.

December 4, 1979 - Order on Motion - Denying Motion for Reconsideration was

filed in Washington State Court of Appeals, Division III, Spokane, Washington.

December 31, 1979 - Defendant filed a Petition for Review in the Washington State Court of Appeals, Division III, Spokane, Washington.

January 21, 1980 - Plaintiff (the State) filed an Answer to Motion for Discretionary Review which was filed in the Court of Appeals on January 10, 1980.

November 26, 1980 - The Supreme Court of the State of Washington, Olympia, Washington, filed its opinion reversing the Court of Appeals - En Banc.

December 10, 1980 - Plaintiff (the State) filed a Motion for Reconsideration in the Washington State Supreme Court, Olympia, Washington.

December 31, 1980 - The Washington State Supreme Court filed an Order Denying Motion for Reconsideration.

January 8, 1981 - The Supreme Court of the State of Washington filed its Mandate Denying Plaintiff's (the State's) Motion for Reconsideration and Affirming its Order Denying Motion for Reconsideration entered December 31, 1980.

PORTIONS OF VERBATIM REPORT OF PROCEEDINGS
Dated March 24 and 29, 1978

(all portions concern examination of Officer Daugherty with the exception of pages 95 and 96 which are portions of the oral opinion of the trial court judge.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR WHITMAN COUNTY

STATE OF WASHINGTON,

Plaintiff,

v. No. C-1799

NEIL MARTIN CHRISMAN
and CARL PHILIP OVERDAHL

Defendants.

VERBATIM REPORT OF PROCEEDINGS

* * * * * * *

[P.4 - Direct Examination]

* * * * * * *

Q. Why did you ask him [Overdahl] to come over to where you were?

A. Well, the presence of the alcohol, and the individual did not appear to be of legal age.

Q. Are there any rules and regulations with the university regarding the possession of alcohol on university premises?

A. The WAC rule covers that there is not supposed to be any alcoholic beverages within the university property. There is also a state law for the open container.

Q. Did, what happened after you stopped him?

A. I then asked the individual if he had

any identification, and he stated he did not.

* * * * * * *

[P.5 - Direct Examination]

* * * * * * *

Q. All right. You stopped him? [Overdahl] Okay. What happened next?

A. I then asked the subject for his identification. He stated that he did not have any. He then asked me to hold the bottle while he returned to his dorm room to obtain the proper identification. I stated at that time it was not our policy to subsequently let an individual leave from an area at that particular point without, it just was not the way that we handled the situation.

Q. Well, I mean, despite what you said in your own words what did you, what meaning did you convey to him regarding his ability to go up to the room to get

some identification?

[P.6 - Direct Examination]

A. I stated to him that he could not go alone because we just don't release people from custody.

Q. All right. At that point what did you think you had in terms of violation of the law?

A. I believed that I had a minor in possession.

Q. All right. What did he say when you told him that he wasn't free to go back up to his room and get his identification?

A. I stated that he could not go back to his room, and that we could both go up which he stated to me okay. We then entered back into Orton Hall and just prior to getting on the elevator I asked the subject how old he was. He stated to me at that time he was 19.

Q. Now, if this person had been over the age of 21, and had come out of the dormitory with that alcohol, would you have stopped him?

A. Yes.

Q. Why is that?

A. Because of the ruling stating, the WAC rules for the alcohol in a university building, and for the fact that it was an open container.

Q. Why do you, why do you seek identification under those circumstances? Say he was over 21?

A. I have no way of being sure that he was over 21 until I have proper identification.

Q. What would you have done with him if he was over 21? What would you have done with him then?

A. Pardon me?

Q. What would you done with the matter if it had turned out he was over 21?

A. I would have probably confiscated the alcohol and turned,

[P.7 - Direct Examination]

written a report for the violation of WAC rules, and submitted it to Student Affairs.

Q. Okay. In any event, you would have needed his identification? Is that correct?

A. Yes.

* * * * * * *

A. As I, we approached the room I observed the door to be open approximately 3 to 4 inches. As we got to the room Mr. Overdahl pushed the door open and entered the room. I stood in the doorway without entering, actually physically entering the room.

[P.8 - Direct Examination]

* * * * * * *

Q. How wide was the door open when Mr. Overdahl first came to the door?

A. Approximately 3 or 4 inches.

Q. Okay. Did you ever tell Mr. Overdahl that he was under arrest?

A. Not physically. I did not state that he was under arrest, however, I did have him in physical custody.

Q. Well, I mean, suppose he'd wanted to leave? What would you have told him?

A. I wouldn't have let him leave.

* * * * * * *

Q. Draw in where the door was when it was opened?

A. When he opened it?

Q. Yes?

A. (Witness does this). Okay. The door was opened to, almost to its full extent, approximately like that.

* * * * * * *

[P.12 - Direct Examination]

* * * * * * *

Q. What happened when he saw you?

A. He appeared to me just from observing him the brief amount of time that I had seen him before he noticed me, at that point he appeared to be, become rather nervous at my presence, the "uniformed presence of a police officer."

Q. What, I mean, how could you tell?

A. He took, he looked over towards my direction and then he looked away, and then he just kind of real quick glanced back, and then he just kind of kept watching as to what actions I was taking.

Q. Well, how did this differ from his actions prior to the time he had seen you?

A. He appeared nonchalant when I saw him. He was just, you know, walking across the room.

* * * * * * *

[P.17 - Direct Examination]

* * * * * * *

Q. Okay. Now, what kind of seeds are these, by the way?

A. Marijuana seeds.

MR. PATRICK: I object to that, Your Honor.

Q. Well, what kind of seeds do you believe these to be?

A. I believe those to be marijuana seeds.

Q. Is that fair?

MR. PATRICK: All right.

Q. Now, somebody is going to ask you undoubtedly why this isn't bird seed or broccoli seeds, or mustard seeds or something like that, what is it about marijuana seeds that you knew at the time that caused you to at least think they were marijuana seeds?

A. It would be the size, the shape of the seeds, which is an oval type, flatter

than they are long or round, the color is anywheres from a light green to a medium brown. The number of seeds together in one location.

Q. What's, what's significant about the number of seeds in one

[P.18 - Direct Examination]

location?

A. Within a university environment where there are in essence no customers, or that type of situation allowed, that amount of seeds together usually establishes that they are in essence users of a controlled substance or to-wit, possibly marijuana.

Q. Fine. Let me ask you just for my own reference, were there any plants in the room?

A. Any plants?

Q. Growing plants?

A. No, sir.

Q. Were there any animals like birds?

A. No, sir.

Q. Was there anything else in there that might account for the presence of seeds? Either growing a garden? Or making broccoli or doing something like that?

A. No, sir.

* * * * * * *

Q. Okay. What did you do after you saw the seeds and the pipe?

A. After I saw the, excuse me, after I saw the seeds and the pipe I looked again back at the seeds, from after I had observed the pipe, I then due to Mr. Chrisman's nervousness, I then entered the room-

[P.19 - Direct Examination]

* * * * * * *

Q. What did you do next?

A. I then entered the room, walked directly to the seeds, I looked at them. I

walked past them. I walked over to the desk and picked up the pipe, smelled the contents of the pipe, which was

[P.20 - Direct Examination]

similar to that of marijuana that I had been in contact with in the past. I then turned and stated to the individuals that before we proceeded any farther that I must advise them of their rights.

* * * * * * *

[P.21 - Direct Examination]

* * * * * * *

Q. How far were you into the room when you saw Chrisman the first time?

A. I was not in the room. I was in the doorway.

Q. Well, you were in the, right there in the doorway?

A. I was enough to lean my shoulder against the doorjamb itself.

* * * * * * *

[P.28 - Direct Examination]

* * * * * * *

Q. Okay. What did you say about how long, for instance, it would take to get a search warrant?

A. We stated that it would probably take in the area of an additional two hours to obtain a search warrant.

* * * * * * *

[P.35 - Cross Examination]

* * * * * * *

Q. Okay. When you met Mr. Overdahl why did you want to see his identification?

A. Because I believed him to be under the legal age to possess alcohol.

Q. I see.

A. Also, for the purposes of-

Q. You wanted to use his identification to establish his age?

A. Yes.

Q. You needed a birth date to establish the age?

A. Also, we use that to, any individuals that we contact we, in order to be responsible for our time they ask us to identify all individuals that we contact.

Q. Okay. If Mr. Overdahl hadn't stated his age, and you hadn't gotten his age, didn't know his age, would you have expected that in the Pullman District Court that he would be convicted of being a minor in possession, without any evidence of his age?

A. I wouldn't have released him until I had proper proof of his age.

Q. That wasn't my question? If you took you case to Pullman District Court and introduced the gin and told the Judge that

[P.36 - Cross Examination]

Mr. Overdahl had the gin, and you didn't know how old he was, but here he is, would you have expected that Judge to have convicted him of being a minor in possession?

A. Not without proof of proper, proper proof of age.

Q. Okay. So, is it fair to say that until you knew his age you didn't have probable cause to place him under arrest? For being a minor in possession?

A. Until I obtained the, until he stated to me that he was under age.

Q. I see. But, you wouldn't have let him go?

A. Not without proper proof of age.

* * * * * * *

[P.37 - Cross Examination]

* * * * * * *

Q. Okay. I take it then that in the hallway, or in the lounge, you had not

advised him of his rights?

A. No, sir.

Q. But, you would have not let him out of your sight? In your judgment he was not free to come and go as he chose, correct?

A. Yes.

* * * * * * *

Q. Okay. Now, when Mr. Overdahl told you that he was 19, you wanted, you still wanted identification, is that what it is? You still asked him for ID?

A. Yes.

Q. Okay. What do you need the ID for?

A. It'd be proof of the age of date of birth, the date of birth, also the correct name of the individual.

* * * * * * *

[P.41 - Cross Examination]

* * * * * * *

Q. . . . What was Mr. Overdahl doing during this time?

A. He was attempting to obtain what I believe to be his identification.

Q. Here?

A. Where?

Q. (Indicating).

A. Right there. Well, he had his back to me facing towards the bed stand.

Q. Was there, was there a billfold there? Or something?

A. I could not observe what was in front of him.

Q. Was he fumbling with things in front of him? Or can you describe what he was doing?

A. He was attempting to obtain it from some location. I couldn't see the location.

* * * * * * *

[P.42 - Cross Examination]

* * * * * * *

Q. At that time you were satisfied, perfectly satisfied that those were the only two people in the room?

A. Yes.

Q. Okay. By the way, did you have a walkie-talkie with you?

A. Yes.

[P.43 - Cross Examination]

Q. And, does that put you in comm-, that obviously puts you in communication with the police department and that's how you called for Officer Kenny?

A. It also puts us in communication with each individual officer.

* * * * * * *

Q. Was the only reason that you went into the room at that time was to look at the seeds and the pipe? That you had seen?

A. Well, I believed that there was a controlled substance. I went in to observe it.

Q. Okay. Go ahead, you went in to observe it?

A. (Nodding in the affirmative).

Q. You went in specifically to look at the seeds and the pipe thinking they were a controlled substance?

A. Yes.

Q. Is that correct?

A. (Nodding in the affirmative).

Q. In fact, is it, would it be accurate to say that you wanted to, you felt that you had reasonable and probable cause to enter the room and examine the articles more closely?

[P.44 - Cross Examination]

A. I believe at that time I did, yes.

Q. Why did you want to examine the articles more closely?

A. Are you asking why? Why did I want to examine them more closely.

Q. Yes?

A. Well, I believed that that's what they were. I went, entered in to affirm my beliefs and to seize the articles, if

they were.

Q. If they were?

A. Right. What I believed to be.

Q. Okay. So, you went in to inspect the seeds and the pipe, for further inspection and for no other purpose?

A. At that point?

Q. There was no other purpose?

A. No, sir.

* * * * * * *

[P.51 - Cross Examination]

* * * * * * *

Q. Well, these seeds, how did these differ from beet seeds?

A. Pardon me?

Q. How do these differ from beet seeds?

A. I'm not familiar with beet seeds.

Q. Onion seeds?

A. I'm not familiar with onion seeds.

Q. Any other seeds? So, any seed you'd see is, ergo a marijuana seed?

A. Yes.

Q. It wasn't supposed to sound that way.

MR. PATRICK: I thought it sounded all right.

Q. Yet you saw those seeds and identified them as marijuana seeds from a distance of about from where you are to here?

A. Not quite that distance.

* * * * * * *

[P.52 - Cross Examination]

* * * * * * *

Q. Is it unusual to see seashells in dorm rooms?

A. I haven't gone into that many dorm rooms to really notice it, how many people have seashells or not.

Q. So, you didn't know when you saw that, that seashell whether it was unusual or not to see it there?

A. Well, the particular seashell in question, the open part of the sea-

shell was facing towards the door, or facing towards me,

[P.53 - Cross Examination]

which would have been the doorway, I observed that the end of it was blackened.

Q. Are you familiar with that type of seashell?

A. I've seen them before.

Q. Huh?

A. I have seen them before.

Q. That type, that particular type?

A. Ones, if not that particular one, similar to it.

Q. What, what is the inside of them normally like? Are they blackened?

A. They're usually either a lighter or approximately the same color as the outside.

Q. And, you recognized it immediately as something that could likely be used for contraband? Or in conjunction with

controlled substances?

A. What I believe, yes.

* * * * * * *

Q. Okay. I guess I misunderstood then. How long did you wait at the doorway then before you entered?

A. I would say it would be between 30 and 45 seconds.

Q. Almost a minute? You stood there?

A. I believe so, yes.

* * * * * * *

[P.56 - Redirect]

* * * * * * *

A. The department attempts to maintain a low profile as far as the actual, I wouldn't know how to exactly put it into words as far as the Adam 12 type arrest. We attempt to be a little more the low profile so we don't injure the atmosphere of the university per se.

Q. In other words, you're catching a lot of flak from the students aren't you?

A. More than our share.

Q. Nevertheless, Officer Daugherty, what do you do short of coming up with a guy and slapping the cuffs on him and telling him he's under arrest for minor in possession? What do you do to assert your authority over him?

A. It depends upon the situation. If there's a large amount of people around I attempt to get the individual off by himself. If there is not, then I direct my attention to the subject at that time.

Q. Okay. Now, and did you or did you not communicate to Mr. Overdahl at the time of the initial stop that he was not free to leave?

A. He asked me if he could, if I would hold the bottle while he went to his room, and I stated that we do not let the people go at that time, that, or I would not release him until he had

[P.57 - Redirect]

proved his age.

Q. At that point did you believe that you had probable cause to believe that he was under the age of 21, in possession of alcohol?

A. I did.

Q. Fine. That's all I have.

* * * * * * *

[P.58 - Recross Examination]

* * * * * * *

Q. When you saw that seed you didn't know but what they might have been agricultural majors?

A. No, sir.

Q. And, you've already established that you really wouldn't know marijuana from onion seed or beet seeds?

A. I, he asked me if I knew what an onion seed looked like. I didn't say that I could differentiate between the two.

Q. You would not be able to, you couldn't tell the difference?

A. It would depend upon whether or not I could see the two side by side. I don't, off the top of my head I do not know what an onion seed looks like, no, sir.

Q. Okay. You earlier, then you also in response to Mr. Bishop's question said that he asked you, according to my notes, if it was unusual to see sea-shells in dormitory rooms, and I think that you responded that you hadn't been in that many dormitory rooms, is that correct?

A. We don't, they're private dwellings, I don't have that much call to go into them except for investigation of cases.

* * * * * * *

[P.95 - Trial Court's Oral Opinion]

* * * * * * *

. . . The officer saw easily what he thought was contraband. Now, he might have been mistaken. If he had been, any charges that were filed would be dismissed. That isn't what we're dealing with. We're not talking about the guilt or innocence of the accused. We're talking about simply did the officer have enough reason to feel that he was looking at contraband. I looked at those seeds when they were displayed here the other day. They really don't look like the seeds of any common commodity that I've seen. I'm satisfied that somebody who's seen them once would at least recognize that he was looking at something

[P.96 - Trial Court's Oral Opinion]

rather similar if he saw them again. They were in open view. There wasn't any illegal search of any kind. The circumstances were such that the two defendants would

have been aware that he might have seen those seeds. Testimony makes it clear that one of the defendants was very uneasy by his presence. Had he simply turned around and left with the defendant, all of that contraband would have been gone about 10 seconds later, probably, and the officer knew that. That is a circumstance that could be, without a doubt, classified as exigent circumstances. He couldn't plausibly have expected to obtain a search warrant under those circumstances and find anything. I don't feel that the observation of the seeds is illegal nor the entry into the room to take a better look was illegal under those circumstances.

* * * * * * * *

TRIAL COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Filed April 17, 1978

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR WHITMAN COUNTY

STATE OF WASHINGTON,
Plaintiff,

v. No. C-1799

NEIL MARTIN CHRISMAN
and CARL PHILIP OVERDAHL,
Defendants.

FINDINGS OF FACT

1. On the 21st day of January, 1978, at approximately 8:55 p.m., Officer Richard Daugherty of the Washington State University Police Department was walking toward Orton Hall, a Washington State University dormitory. As he approached the front door to Orton Hall, Officer Daugherty observed the defendant, CARL PHILIP OVERDAHL, exit Orton Hall with a number of his friends. Mr. Overdahl was carrying a half gallon of gin. Mr. Overdahl appeared to Officer Daugherty to be

under the age of 21 years.

2. Believing that the defendant, CARL PHILIP OVERDAHL, was not of legal age, Officer Daugherty stopped him and asked him for his identification. Mr. Overdahl stated that he did not have any identification on his person, but that he did have identification upstairs in his room. Mr. Overdahl then asked Officer Daugherty if Officer Daugherty would wait downstairs while he ran up to his room and procured the identification. Officer Daugherty told Mr. Overdahl that under the circumstances that this would not be possible and that Officer Daugherty would have to accompany Mr. Overdahl to his room. To this Mr. Overdahl stated "OK". This conversation was observed by at least one other person, Lisa Anthony, who believed, based upon her observation of the situation that Mr. Overdahl was being detained by Officer Daugherty and

that Mr. Overdahl was not free to leave.

3. Officer Daugherty did not intend to let Mr. Overdahl leave his presence until proper identification had been procured. Once proper identification had been procured and Mr. Overdahl had not demonstrated that he was over 21, had this been a normal arrest for minor in possession, he would have been taken as is the routine procedure, to the Washington State University Police Station, booked, issued a citation and released.

4. Following the initial contact, Officer Daugherty and Mr. Overdahl proceeded to the 11th floor of Orton Hall. On the way, Officer Daugherty asked Mr. Overdahl his age, to which Mr. Overdahl responded that he was 19. Upon arriving at the 11th floor, Officer Daugherty and Mr. Overdahl went down the hallway, Mr. Overdahl leading and Officer Daugherty a step or two

behind. Officer Daugherty observed the door to Mr. Overdahl's room to be open about three or four inches. Mr. Overdahl pushed the door open and entered the room. In order to keep Mr. Overdahl within his view, Officer Daugherty stood in the doorway, directly under the door frame, looking into the room, his left shoulder leaning against the door frame.

5. At this point Officer Daugherty observed a second individual in the room holding a box which he was apparently attempting to place in the medicine cabinet on the south wall. When this second subject, ultimately determined to be defendant, NEIL CHRISMAN, observed Officer Daugherty he immediately became, to Officer Daugherty's observation, very nervous. Mr. Chrisman then removed the box from the medicine cabinet and placed it on a desk on the northeast corner of the room. It was apparent to

Officer Daugherty, from the actions of Mr. Chrisman, that he was very upset and anxious about the presence of Officer Daugherty.

6. Officer Daugherty then observed a black and gold tray containing what appeared to Officer Daugherty to be marijuana seeds. The room itself is approximately 10 feet by 17 feet. The tray that Officer Daugherty observed was approximately 8 to 10 feet away from him on a desk near the center of the north wall. The lighting in the room was such that Officer Daugherty had no difficulty seeing the seeds from that distance. Officer Daugherty then observed a small seashell pipe on the top of the desk in the northeast corner of the room. At that point, reasonably believing what he had seen was contraband, Officer Daugherty walked forward to examine the articles more closely. Upon examination, the pipe had an odor similar to that of marijuana resi-

due and a closer observation of the seeds verified Officer Daugherty's earlier observation that they were, in fact, marijuana.

7. Officer Daugherty's observation of the contraband in the room and Mr. Chrisman's reaction to Officer Daugherty's presence were such that it is reasonably apparent that if Officer Daugherty had left the premises immediately after observing the seeds and pipe and attempted to secure search warrants, the contraband would likely have been removed during the interim.

8. Officer Daugherty, through his formal police training, his on the job experiences, and his background as a student at Washington State University, was familiar with the appearance and characteristics of marijuana seeds. The seeds themselves had that characteristic size and color. Also, the ornamental seashell

pipe was known to Officer Daugherty to be similar to the kinds of paraphernalia used for smoking marijuana.

9. Upon observing the seeds and the marijuana pipe, Officer Daugherty then advised Mr. Chrisman and Mr. Overdahl that he had seen the seeds in their room. Officer Daugherty then advised both Mr. Chrisman and Mr. Overdahl of their rights under Miranda, fully and completely. Both of them affirmatively acknowledged to Officer Daugherty that they understood their rights as granted to them under Miranda. Also, they both affirmatively indicated to Officer Daugherty that they would have no objection to talking with him and answering some questions regarding their possession of controlled substances. Identification was then taken from both individuals.

10. Officer Daugherty then asked both Mr. Chrisman and Mr. Overdahl if they had

any other controlled substances in the room. Mr. Chrisman walked over to the desk in the northeast corner and picked up the box that he had been carrying earlier. Mr. Chrisman opened the box and inside were three plastic baggies of what appeared to be marijuana and $112.00 in cash. These items were seized by Officer Daugherty.

11. Officer Daugherty then called Lt. Michael Kenny for assistance. Lt. Kenny arrived shortly thereafter. He was shown the articles seized by Officer Daugherty and advised of the events that had transpired earlier. Lt. Kenny observed that Mr. Chrisman, initially, was quite nervous. Lt. Kenny directed him to sit down and after a short time Mr. Chrisman calmed down noticeably. Lt. Kenny explained to both Mr. Chrisman and Mr. Overdahl that under the circumstances a search of their residence would be necessary. He explained

that they had an absolute right to demand that a search warrant be procured prior to any search. He explained that in order to get a search warrant he and Officer Daugherty would have to complete affidavits and go before the Judge and ask the Judge to issue a search warrant. He further explained that this process would take about two hours. He indicated that, on the other hand, they could voluntarily consent to the search. Mr. Chrisman and Mr. Overdahl were then given the opportunity to discuss whether or not they wished to consent. After a conversation between themselves, which lasted about five minutes, both Mr. Chrisman and Mr. Overdahl affirmatively indicated to Lt. Kenny that they would consent to a search of their residence. Both Mr. Chrisman and Mr. Overdahl appeared to Lt. Kenny to understand the explanations that were made them and they further appeared to be able

to make an intelligent decision regarding whether or not they wished to consent.

12. Following the obtaining of the oral consent, Cpl. Stevens of the Washington State University Police Department was called and asked to bring written consent to search forms to the room. He arrived approximately 20 minutes later. During this interim period both Mr. Chrisman and Mr. Overdahl were once again advised of their rights under Miranda which they once again affirmatively acknowledged and waived. Officer Daugherty went over the written consent to search forms with both Mr. Chrisman and Mr. Overdahl, explaining the various aspects of the form, and obtained their signatures. Once this had been accomplished, the room was searched in the presence of Mr. Chrisman and Mr. Overdahl. Various items of contraband, including marijuana, LSD, and papers tending to reflect the sales of controlled substances,

were seized.

CONCLUSIONS OF LAW

1. Officer Daugherty properly placed defendant, CARL PHILIP OVERDAHL. under arrest for Minor in Possession. Under the circumstances presented to him at the time, Officer Daugherty was entitled to, and should have, kept Mr. Overdahl in his presence and accompanied Mr. Overdahl to his room to procure identification. Officer Daugherty was validly in the room pursuant to his arrest of Mr. Overdahl.

2. The marijuana seeds and pipe were appropriately seized by Officer Daugherty, being in his "plain view".

3. The request to Defendant Chrisman for any additional controlled substances by Officer Daugherty was appropriate. The "statement" made by Mr. Chrisman, that he knew where the contraband was located and he was not possessing it by mistake, was

made after an appropriate advisement of the defendant's rights under Miranda.

4. The exigent circumstances presented to Officer Daugherty justified his seizure of the seeds and pipe without a warrant.

5. The subsequent consent to search given by the defendants was entirely voluntary and without coercion.

DATED this 17th day of April, 1978.

Philip H. Faris
Judge

[signature blocks for counsels omitted in printing]

TRIAL COURT'S MEMORANDUM OPINION
Filed April 17, 1978

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR WHITMAN COUNTY

STATE OF WASHINGTON,

Plaintiff,

v. No. C-1799

NEIL MARTIN CHRISMAN
and CARL PHILIP OVERDAHL,

Defendants.

FACTS

An officer observed Defendant Overdahl leaving Orton Hall carrying a half gallon bottle of gin. Overdahl looked under 21 years of age to the officer. The officer knew that persons under twenty-one could not legally possess liquor and also knew that possessing liquor inside dormitories was a violation of Washington State University rules. The officer stopped Overdahl, seized the alcohol and asked for identification without advising Overdahl of Miranda rights. Overdahl offered to go to his room and get his identification and return, but the officer rejected that

proposal. The two went together to Overdahl's room. Overdahl opened the door, which was slightly ajar, left it open and went inside for his identification. The officer stood in the doorway, and watched. Chrisman was in the room. The officer observed a pipe of a type known by him to be used for the smoking of marijuana and seeds which appeared to him to be marijuana seeds. He was familiar with marijuana and marijuana seeds. When Chrisman became aware of the officer he appeared to become nervous and upset. The officer then entered the room and examined the pipe and seeds closely. Both defendants were then advised of their Miranda rights. The officer asked the defendants if they had other contraband, and Chrisman picked up a plastic box which he opened and inside of which were three plastic baggies containing material which appeared to be

marijuana and $112.00 in cash. The officer seized these articles. The officer called for assistance, and a superior officer arrived shortly. The two officers discussed with the defendants the question of searching the room. The superior officer explained procedures for obtaining a search warrant, and that the defendants could waive a search warrant and voluntarily consent to a search. The explanation was complete and the defendants were made aware that they were not required to consent to a search. The defendants discussed the matter privately and ultimately agreed to consent to the search, which was conducted and which yielded up more marijuana, a quantity of LSD, and documents tying defendants to drug transactions.

ISSUES

The defendants urge that Overdahl's original actions in going to the room with

officer, without being advised of his Miranda rights, were therefore involuntary; that the officer's conduct in looking into the room and in entering the room constituted an unlawful search; that the voluntary consent to the further search was vitiated by the illegalities preceding the same; that all of the drug evidence should be suppressed.

DECISION

Evidence obtained as a result of an unreasonable search and seizure must be suppressed. Admissions made by defendants while in custody and as the result of interrogation conducted without being advised of their rights must also be suppressed.

Although some question may exist as to the propriety of requesting identification without advising Overdahl of his Miranda rights, no prejudice to Overdahl arises therefrom. The alternative would

have been his formal arrest and detention until he could be identified. His identification would have also yielded proof of his age. It is difficult to find criticism of police conduct where an officer has probable cause to make a formal arrest but instead of doing so offers the defendant an opportunity to establish his innocence by proof of age.

In any event, no wrong-doing is to be attributed to the officer in accompanying Overdahl to his room. At that point he was able to see contraband while lawfully standing in the open door and without conducting a search. He was also aware, from common sense and from the suspicious conduct of Chrisman that if he departed with the intention of obtaining a search warrant, that the contraband would rapidly disappear. This clearly constitutes exigent circumstances and justifies the entry into the

room to seize the additional contraband.

The officer's explanation of the alternatives between a voluntary consent to the further search and the obtaining of a search warrant was complete and accurate and the defendants did voluntarily consent to the further search.

Defendants' motions to suppress will be denied.

The following authorities are of interest. State v. Brown, 9 Wn. App. 937; officers looked through drapes opened by occupants for purpose of identifying who knocked. State v. Manley, 85 Wn. 2d 120; officers looked through open window with binnoculars to identify marijuana. State v. Greco, 52 Wn. 2d 265; and State v. Werth, 18 Wn. App. 530; clear and positive evidence of a voluntary consent is required. State v. Rye, 2 Wn. App. 920; State v. Neff, 10 Wn. App. 713; consent predicated upon a

threat to obtain a search warrant is not per se coerced. State v. Murray, 8 Wn. App. 944; consent obtained by persuasion is valid. State v. Zantua, 8 Wn. App. 47, confirms Terry v. Ohio and Sibron v. New York as Washington law wherein investigative stops to determine identity may be permitted. State v. Smith, 88 Wn. 2d 127, exigent circumstances. Coolidge v. New Hampshire, 403 U.S. 443; State v. Coburne, 10 Wn. App. 298; discussions of plain view doctrine; State v. Lesnick, 84 Wn. 2d 940; State v. Proctor, 12 Wn. App. 274; observations in the course of an investigation as within the plain view doctrine.

DATED this 6th day of April, 1978.

Philip H. Faris
Superior Court Judge

PORTIONS OF PETITIONER'S (STATE'S)
WASHINGTON STATE COURT OF APPEALS BRIEF

(a portion of page 18, page 19,
and a portion of page 20)

Filed December 22, 1978

No. 2949-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

NEIL MARTIN CHRISMAN, Appellant,

and

CARL PHILIP OVERDAHL, Appellant.

APPEAL FROM THE SUPERIOR COURT FOR WHITMAN COUNTY, Honorable Philip H. Faris, Judge

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* * * * * * *

4. DID THE INITIAL SEIZURE OF THE CONTRABAND BY OFFICER DAUGHERTY FALL WITHIN THE EXCEPTION TO THE WARRANT REQUIREMENT INVOLVING "EXIGENT CIRCUMSTANCES"?

The United States Supreme Court has recognized that there are circumstances under which a police officer may enter a private residence without a warrant and search. In U.S. v. Jeffers, 342 U.S. 48, 51-52 (1951), the Court recognized that exigent circumstances may allow the entry into a private residence to seize evidence without a warrant. An exigent circumstance cited by the court in Jeffers would be the need to prevent the destruction of evidence. This principle is likewise acknowledged, though not applied, in Vale v. Louisiana, 399 U.S. 30, 35 (1970).

An example of the application of the rule is found in U.S. v. Guidry, 534 F.2d 1220 (6th Cir., 1976). In Guidry, the police had a particular residence under surveillance, believing that it contained a printing press used for the manufacture of counterfeit money. The court found that

there was probable cause to believe that the press and the counterfeit money were in the residence. During the course of the observation, it became apparent to the officers that the residents of the house were aware that they were being observed. Shortly thereafter one of the agents saw someone start a fire in the carport. It reasonably appeared to the agent that the residents of the house were in the process of destroying the counterfeit money. The court held as follows, Guidry, 534 F.2d at page 1223:

> We agree with the district judge that the totality of the circumstances confronting the officers on the scene was such as to indicate that efforts to destroy evidence were in progress and would be likely to be completed absent prompt action in entering the premises under surveillance. While the agents, probably from the time (the officer) "blew his cover" or certainly by the time fifteen minutes later when agents observed the fire in the carport could have obtained a search warrant, the time required might well have allowed

for the destruction of all the counterfeit money.

Likewise U.S. v. Shima, 545 F.2d 1026 (5th Cir., 1977), supports the position cited by the court in Guidry. The court in Shima held, 545 F.2d at page 1028:

> It must be recognized at the outset that only in "a few specifically established and well delineated" situations may a dwelling be searched without a warrant, even if there is probable cause to conduct it, and the burden is upon the government to show that the exception existed . . . Among the recognized exceptions are (1) official response to an emergency, or (2) the goods ultimately seized were in the process of destruction, or (3) it was impracticable to obtain a warrant . . . Imminent destruction, removal, or concealment of property intended to be seized, or the likelihood of it taking place before a warrant can be obtained, may provide an exception.

From a review of the evidence at the suppression hearing, the court did specifically find that, in addition to the fact that the officer was within the room and saw the contraband in plain view, that there were

exigent circumstances authorizing a search without a warrant. (RP 111, lines 24-30; RP 112, lines 1-2; Finding of Fact 5, Suppression; Conclusion of Law 4, Suppression). This finding is certainly supported by Officer Daugherty's testimony. (RP 18, lines 27-30; RP 19, lines 1-7; RP 23, lines 10-15; RP 12, lines 1-14; Memorandum Opinion, page 3, line 3-7).

* * * * * * *

PETITIONER'S (STATE'S) ANSWER TO MOTION FOR DISCRETIONARY REVIEW

(A portion of page 4)

Filed January 10, 1980

No. 2959-III

No. 2991-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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* * * * * * *

Neverthless, the trial court quite properly ruled that there were exigent circumstances justifying the seizure of the items seen by Officer Daugherty.

* * * * * * *

Office-Supreme Court, U.S.
FILED
MAR 20 1981
ALEXANDER L. STEVAS,
CLERK

DOCKET NO. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

v.

NEIL MARTIN CHRISMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Presented By:

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ARGUMENT

From the Trial Court through the State Supreme Court, and, now, through this Court, Defendant, Neil Martin Chrisman, has consistently asserted that the act of Officer Daugherty in picking up the marijuana seeds in Mr. Chrisman's dormitory room for further examination constituted an illegal search and seizure nullifying the entire search of the dormitory room in question.

It is obvious from the decision of the Washington Court of Appeals and from the decision of the Washington Supreme Court that both appellate courts are in some disagreement as to whether Officer Daugherty was in the room at the time he saw the marijuana seeds. The Court of Appeals held that he was not in the room,

State v. Chrisman, 24 Wn.App.385, 600 P.2d 1316 (1979) and the State Supreme Court held that he was in the room State v. Chrisman, 94 Wn.2d 711, 716, 619 P.2d 971 (1980). The State adroitly observes that he was both in and out of the room, apparently at the same time. The State on the one hand says Officer Daugherty was in the "area" (first question presented). This can only mean the dormitory room, since the room would have been the protected area. On the other hand, the State says he was not in the room (second question presented).

It has steadfastly been the position of Mr. Chrisman throughout these proceedings that Officer Daugherty was out of the room when the seeds were observed. As will be discussed below, however, whether Officer Daugherty was in

the room or whether he was outside the room makes no difference in determining the validity of the search.

If Officer Daugherty were in the dormitory room, the State is immediately confronted with the proposition that he was not entitled to be in that room. There are two reasons why he was not entitled to be in the dormitory room. The first is that since Mr. Overdahl (the roommate of Mr. Chrisman) had been placed under arrest, it was necessary for the police officer to advise Mr. Overdahl of his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966)), prior to eliciting information from him as to his age (a crucial element of the crime for which he had been arrested). When Mr. Overdahl offered to obtain proof of his age at his

dormitory room, he was offering to give evidence against himself prior to the time that he was advised of his right to refuse to give such evidence under Miranda. Hence, when Mr. Overdahl went to his room, accompanied by the officer, the officer was not where he had a right to be, since he was there by virtue of violating Mr. Overdahl's Constitutional rights. Since he was not in a location where he had a right to be, Officer Daugherty's observation of the marijuana is not protected under the plain view doctrine.

In all of the cases cited by the State to justify the police warrantless entry with the defendant, the defendant had requested to go into the room to get something for himself or otherwise fulfill his own purposes. In the case at

bar, Mr. Overdahl went to his room to get evidence, without the benefit of having been provided his Miranda warnings. The State, conveniently, completely ignores this important distinction.

The second reason that Officer Daugherty was not where he had a right to be (if he was in the room) was that he need not have been in the room in order to accomplish what it was that he wanted to accomplish, i.e., keeping Mr. Overdahl in his line of sight. Notice, the officer was obviously not concerned about weapons, nor was he concerned about avoiding the destruction of evidence. Had he been concerned about the possibilities, he would have been at Mr. Overdahl's shoulder, or some place where he could keep Mr. Overdahl's hands in

sight.

If we accept the principle that warrantless intrusions should be kept as narrow as possible, we are left with the proposition that Officer Daugherty should have been outside the dormitory room while Mr. Overdahl was looking for his wallet. In this connection, see Payton v. New York, 445 U.S.573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980).

It seems rather clear that Officer Daugherty felt that he should not be in the room; otherwise, why was he not fully in the room? Obviously, he did not feel it necessary that he be in the room to accomplish his motive.

Thus, as indicated above, if Officer Daugherty were found to be in the room, he obviously did not have the right to be there. The first prerequisite of the "plain view" doctrine, therefore, is not

present.

The justification for the "plain view" doctrine is, of course, that the intrusion into the constitutionally protected area having already been properly made, the police officer need not ignore what comes to his senses. See Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

Notice, however, that under the "plain view" doctrine, we are talking about seizing items where the entry is already deemed, for one reason or another, to be valid. The Washington Supreme Court properly found that there was no prior justification for the intrusion in this case (if the intrusion had already been effected).

If Officer Daugherty were outside the room at the time he saw what he

thought might be contraband, as found by the Washington Court of Appeals, the State now has another hurdle which it must overcome. That hurdle is whether or not merely seeing possible contraband through an open door gives a police officer the right to enter the premises in order to "take a closer look". Notice, the "plain view" doctrine would not benefit the State if Officer Daugherty is outside the room when he sees what he thinks is contraband, since the "plain view" doctrine applies only to post intrusion situations.

If Officer Daugherty were outside the room when he saw the substance, the warrantless entry can only be justified by finding the circumstances to be exigent. In State v. O'Herron, 153 N.J.Super. 570, 380 A.2d 728 (1977) the

New Jersey Appellate Court found that there was an illegal search and seizure when the police observed marijuana in the defendant's backyard from a neighbor's backyard, and, without a warrant, seized it. The Court stated at 380 A.2d at page 733:

> We hold, . . . , that a "plain view" observation made without intrusion into a constitutionally protected location does not itself justify a warrantless intrusion and seizure.

In the O'Herron case, the Court noted no special urgency. Similarly, in the case at bar, there was no special urgency. In this connection, see also, Johnson v. U.S., 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948), wherein this Court found that an unmistakable odor of burning opium provided probable cause to obtain a search warrant, but did not provide

sufficient exigent circumstances to permit the entry of a hotel room without a warrant.

Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 86 S.Ct. 2408 (1978) provides clear-cut guidelines as to when exigent circumstances are present. Notice, this Court stated at 437 U.S. 394:

> There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility.

Thus, under the Mincey teachings, if the premises can be guarded, the circumstances are not so exigent as to justify a warrantless entry.

In the case at bar, there is nothing in the record to indicate that the

circumstances were exigent. For instance, no water was running, no toilet was being flushed (there was no toilet in the room), no one was scurrying around trying to hide or destroy evidence. Further, the police officer could have easily stayed at the door and radioed for assistance in obtaining a search warrant. The record is clear that the officer had a portable radio on his person which could have been used. Indeed, the radio was finally used to call for assistance in conducting the search.

The State, in propounding its second issue, would have this Court consider a ruling to the effect that when a police officer, standing outside a protected area, views possible contraband which is in a protected area, the view in itself provides exigent circumstances so as to

permit a warrantless entry into the protected area. This has never been the law in this country and this Court must keep such a result from ever becoming the law, if we are to remain a society free from police state tactics. So far as the undersigned can determine, exigent circumstances have never been equated with inconvenience to the police officers.

There were only two ways the items in question could have been removed pending issuance of a search warrant. One was through the door where the police officer was standing. The second was through the window, which was in the officer's view. In these circumstances, where were the exigencies?

There is another aspect of this case that causes some concern. The Washington Appellate Courts, in this case, have not

really discussed whether or not the police officer had probable cause to search the room. The two Courts do not seem to question whether the officer had probable cause to believe the substance was marijuana. In this connection, the question might be asked, if the police officer went to a neutral, detached magistrate, and informed the magistrate that he saw what he thought were marijuana seeds and a pipe, and that he wanted to obtain a search warrant to examine them more closely and seize them if they were marijuana, would that magistrate have issued the search warrant, or would he have asked the police officer why he wanted to examine them more closely if he really thought they were marijuana? Notice, the police officer, according to his own testimony,

entered the room to examine the seeds more closely to see if they were marijuana, and for no other purpose. (RP 43, lines 23 through 30; RP 44, lines 1 through 13). It was his testimony that, if upon examination, he confirmed his suspicions that the seeds were marijuana, he would have seized them (RP 44, lines 5 through 6). It is respectfully submitted that at the time he entered the room to look at the seeds, he had some suspicions, but not probable cause, to think the seeds were marijuana. Under these circumstances, a truly detached, neutral magistrate should have denied the search warrant for lack of probable cause, since the police officer wanted entry to examine and confirm his suspicions.

Moreover, if it is determined that

Officer Daugherty was outside the room at the time he saw what he thought might be marijuana seeds, then it is also submitted that he should have announced his intention to enter, prior to making the entry. See Ker v. U.S., 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963).

In the case at bar, of course, there is no question but what the police officer was never in danger. Accordingly, one of the primary bases for holding the knock and announce rule to be inapplicable is missing.

On the other hand, the Courts in this country recognize that, irrespective of the safety of the police officer, the dignity and privacy of the individual must be protected. In this connection see People v. Ouellette, 57 Ill.App.3d 249, 373 N.E.2d 114 (1978) (even if

occupants know who the police officer is, they must be given a chance to say "no" to his entry before the police officer enters). Similarly, the Rhode Island Supreme Court found a violation of the knock and announce rule in State v. Slezak, 350 A.2d 605 (R.I. 1976) where a police officer opened a screen door, without knocking, and without announcing his identity and purpose. Immediately upon entry, he recognized the defendant and the defendant recognized him. After the officer had crossed the threshhold, he stated to the defendant, "This is Detective Sullivan. I think you know what we are here for, Steve. We're going to advise you of your constitutional rights. Why don't you have a seat in the kitchen?" Thus, the Washington Supreme Court could easily be affirmed on the

proposition that the officer violated the knock and announce rule prior to his entry.

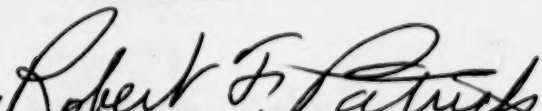
Finally, it should be reiterated that the State seems to be wanting to take both sides of the issue of whether or not Officer Daugherty was in the room. Notice, the first question presented by the State assumes that Officer Daugherty was in the protected area (the dormitory room). The second question presented assumes the officer was immediately outside the premises. Based on the State's alternate location of the police officer, the State argues the circumstances were exigent. Was Officer Daugherty in the room or wasn't he? It is respectfully submitted that unless the factual questions are clearly delineated by the party seeking review, this Court should not spend its time on the case.

CONCLUSION

The State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AITKEN, SCHAUBLE, PATRICK, NEILL & CHARAWELL

By 

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No. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

PETITIONER,

v.

NEIL MARTIN CHRISMAN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. When an officer is standing immediately outside the premises in the doorway of the premises and his presence is known to the occupants, one of the occupants being an arrestee who has been allowed to enter the premises; and the officer makes observations of contraband in open view and such observations are apparent to the occupants of the premises; do "exigent circumstances" exist which would permit the officer to enter the premises without a search warrant under an "exigency exception" to the Fourth Amendment warrant requirement?

2. When an individual is validly under arrest and asks to be given access to an area, may the arresting officer in a reasonably contemporaneous manner accompany the individual into such area without first obtaining a search warrant authorizing entry into such area?

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OPINIONS BELOW

The opinion of the Washington State Supreme Court (Pet.App. B, pp. 33-43) is reported at 94 Wn.2d 711, 619 P.2d 971. The opinion of the Court of Appeals (Pet. App. A, pp. 20-32) is reported at 24 Wn.App. 385, 600 P.2d 1316. The opinion of the Whitman County, Washington Superior Court (J.A. pp. 45-52) is not reported.

JURISDICTION

The judgment of the Washington State Supreme Court (Pet.App. B, pp. 33-43) was entered en banc on November 26, 1980. A Motion for Reconsideration was filed on December 10, 1980. On December 31, 1980, the Washington State Supreme Court entered an Order Denying Motion for Reconsideration (Pet.App. C, p. 46). On January 8, 1981 the Washington State Supreme Court entered its Mandate (Pet.App. C, pp. 44-45). The

Petition for Writ of Certiorari was filed on February 10, 1981 and was granted on June 22, 1981. The jurisdiction of this court rests upon 28 U.S.C. 1257(3) and the provisions of Supreme Court Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISION INVOLVED IN REVIEW

The Constitutional provision involved in review is the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the evening of January 21, 1978, between approximately 8:50 and 8:55 P.M.

(R.P. 3, R.P. hereinafter refers to Verbatim Report of Proceedings at Suppression Hearing) Mr. Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University with several student friends on their way to a party (R.P. 3). At that moment Officer Daugherty of the Washington State University Police Department arrived at the dorm to investigate an unrelated matter (R.P. 3). The officer noticed the bottle of gin and suspected that Mr. Overdahl, because of his youthful appearance, was under the legal age to possess alcohol, the age of twenty-one (R.P. 4,6; J.A. 7,8). The officer knew that a person under twenty-one years of age could not legally possess liquor in Washington and also knew that possessing liquor inside dormitories was in violation of Washington State University rules (J.A. 7,9,10). He stopped Mr. Overdahl, seized the alcohol, detained him and

requested identification (R.P. 5,57). Mr. Overdahl did not have any identification on his person (J.A. 8). Mr. Overdahl stated that he would have to go upstairs to his dormitory room to get the identification (J.A. 8). Officer Daugherty indicated to Mr. Overdahl that since Mr. Overdahl was under police detention, he would not allow him to leave without an officer accompanying him to his room (R.P. 5,6,35; J.A. 9); because he needed identification (J.A. 19, 21). Mr. Overdahl indicated "O.K." (J.A. 35). As they were waiting for the elevator, the officer asked Mr. Overdahl how old he was. Mr. Overdahl responded that he was nineteen (R.P. 6; J.A. 9.).

Upon arriving on the eleventh floor of the dormitory, Officer Daugherty followed Mr. Overdahl down the hallway to Mr. Overdahl's room, Room 1141 (R.P. 7,59). The door to Mr. Overdahl's room was slightly

ajar, open approximately three to four inches (J.A. 11,12) and Mr. Overdahl pushed it all the way open (J.A. 12), left it open, and entered the approximately 17' by 11' room (J.A. 1). The officer stood in the doorway, without entering the premises (J.A. 17), directly under the door frame, looking into the room. The officer's left shoulder was leaning against the door frame (he was out in a common public hallway) (R.P. 7,8,19,21, 43,44; J.A. 47). The officer noticed that the room was occupied by another student, Neil Chrisman, the respondent in this action, hereinafter referred to as defendant (R.P. 9). The defendant had a box in his hands, admitted at the Suppression Hearing as Ex. 5 (R.P. 10). The defendant did not immediately see Officer Daugherty, according to Officer Daugherty (R.P. 10). After approximately 8 to 10 seconds he saw Officer Daugherty (R.P. 39-40). When the defendant did see

Officer Daugherty, he appeared to Officer Daugherty to become rather nervous (R.P. 12; J.A. 13), first looking at Officer Daugherty, then looking away, then glancing quickly back (R.P. 12). The defendant then approached the medicine cabinet in the room, put his hand toward it, withdrew his hand and walked over (R.P. 12) to a desk in the corner of the room. The defendant placed the box he was carrying on top of some metallic boxes on the desk (R.P. 13) and moved toward the center of the room (R.P. 12) and watched Officer Daugherty (R.P. 13).

After waiting at the doorway and watching the occupants for a short time, approximately 30 to 45 seconds (R.P. 53; J.A. 28), Officer Daugherty observed both seeds in a shallow black pan and a small ornamental seashell pipe lying on the desk (R.P. 13), [the end of the pipe was blackened (R.P. 52, 53; J.A. 27)] approximately 8 to 10 feet

from where Officer Daugherty was standing (R.P. 14). The pipe was of a type known by the officer to be used for smoking marijuana (R.P. 17; J.A. 47). The light in the room was such that the officer had no trouble seeing the seeds from that distance (R.P. 10, 48; J.A. 38). Based upon his training and experience (R.P. 45) the officer immediately recognized the items as contraband (J.A. 23,24,27,28) (prior to entering the premises). The officer was familiar with the appearance of marijuana seeds (R.P. 45, 46; J.A. 14,15,23,24). He thereafter entered the room and proceeded to examine the seeds and pipe more closely (R.P. 13,17,18). After completing his inspection, he again concluded that the items were contraband and gave the two students their Miranda rights (R.P. 19,20). [later at the suppression hearing the trial judge commented that the seeds in question did not appear

to look like seeds of any common commodity, J.A. 32]. There were no plants or animals in the room that would explain the presence of the seeds (R.P. 18; J.A. 15,16). Both Mr. Overdahl and the defendant indicated that they understood their rights and were willing to waive them (R.P. 23,24). The officer asked them if there were any other drugs in the room and the defendant handed him the box that Officer Daugherty had observed the defendant place on the desk. The box contained three bags of marijuana (R.P. 60; J.A. 47).

Officer Daugherty radioed for assistance and Officer Kenny arrived shortly thereafter, approximately 3 to 5 minutes (R.P. 26). Officer Kenny informed the defendant and Mr. Overdahl that a search of their room was necessary (R.P. 27). He explained that they had an absolute right to demand that the police obtain a search

warrant, which would take about two hours (R.P. 28; J.A. 18), or they could consent to a search of their room. He further explained that their consent must be voluntary and that they had a right to refuse consent (R.P. 62). After conferring in whispers for approximately 4 to 10 minutes (R.P. 64), Mr. Overdahl and the defendant agreed to the search (R.P. 64,65). Prior to signing a written consent to search form, the defendant and Mr. Overdahl were again advised of their Miranda rights (R.P. 69; J.A. 43). A search of the room yielded more marijuana and also LSD (J.A. 48).

The defendant and Mr. Overdahl were charged by information with one count of felony possession of marijuana and one count of felony possession of LSD (J.A. 2). Prior to the trial, a suppression hearing was held and the defendants moved to suppress all evidence on the basis that all the evidence was tainted as a result of an

illegal search and seizure. The trial judge denied the motion (J.A. 44-45). The defendant and Mr. Overdahl were tried without a jury and convicted as charged (J.A. 3). This conviction was appealed to the Washington State Court of Appeals, Division III (J.A. 4). In a published opinion the Court of Appeals upheld the defendants' convictions (J.A. 4; Pet.App. A, pp. 20-32). The Court of Appeals indicated that the officer's observation of the contraband in the room and the defendant's reaction to the officer's presence were such that if the officer had left the premises immediately after observing the seeds and pipe in an attempt to secure a search warrant, the contraband would likely have been removed during the interim and additionally, because drugs are readily disposable, there were sufficient exigent circumstances existing to justify the warrantless search of the

room; the contraband permissibly having come into view as the product of a pre-intrusion "open view" observation from the doorway of the room (Pet.App. A, pp. 29-30). The defendant and Mr. Overdahl then filed with the Court of Appeals a Motion for Reconsideration which was denied on the 4th day of December, 1979 (J.A. 4-5).

Both the defendant and Mr. Overdahl then appealed to the Washington State Supreme Court alleging that the seizure was the product of an illegal warrantless search (J.A. 5).

On March 31, 1980, the Superior Court dismissed the felony probation and expunged the conviction of Mr. Overdahl to facilitate his entry into an advanced Army ROTC program, therefore this case only concerns the defendant. The dismissal was upon joint motion of petitioner herein and Mr. Overdahl through his legal counsel.

On November 26, 1980, the Washington State Supreme Court ruled in the defendant's favor (Pet.App. B, pp. 33-40) and found (see comments in dissenting opinion Pet.App. B, pp. 40-41) that the officer could not enter the room without a warrant even to accompany an arrestee who had requested to be allowed and had been allowed to voluntarily return to the room in question (Pet. App. B, pp. 42-44). Additionally the Washington State Supreme Court found that at the time of the officer's entry into the room, that there were no exigent circumstances that justified a warrantless entry, rejecting the application of "plain view" and the applicability of any exception to the warrant requirement based on exigent circumstances (Pet.App. B, p. 39).

Although the Washington State Supreme Court Opinion indicates exigencies were not argued (Pet.App.B, p.39), this is an apparent reference to exigencies other

than the observations made by the officer outside the room. The Washington State Supreme Court declined to decide where the officer was originally located inside the room at the time of his initial observations of the contraband, labeling such as "niceties". (Pet.App. B, p. 38). There is no question that exigencies were argued by the petitioner at every stage of the proceedings in this matter (R.P. 92),; see trial court's oral opinion (J.A. 32-33); the trial court's findings of fact and conclusions of law (J.A. 45); the trial court's memorandum opinion which discusses circumstances to justify entry into the room (J.A. 50); the State's brief to the Court of Appeals (J.A. 53-57); the Court of Appeals Opinion accepting the State's argument concerning exigent circumstances (Pet. App. A, pp. 28-29); and State's Answer to Defendant's Motion for Discretionary Review filed with

the Washington State Supreme Court (J.A. 58).

On December 10, 1980, the State filed with the Washington State Supreme Court a Motion for Reconsideration of its judgment (J.A. 5). On December 31, 1980 the Washington State Supreme Court entered an Order Denying Motion for Reconsideration (Pet.App. C, p. 46). On January 8, 1981 the Washington State Supreme Court entered its Mandate in the case (Pet.App. C, pp. 44-45). On February 10, 1981 the Petition for Writ of Certiorari was filed. On June 22, 1981 the Petition for Writ of Certiorari was granted.

SUMMARY OF ARGUMENT

I.

The Fourth Amendment to the United States Constitution protects people, that is, a person's reasonable expectation of privacy in a place, not the place. By Mr. Overdahl leaving the door to the premises wide open which afforded the officer an all encompassing "open view" of the premises and the contraband in question, Mr. Overdahl's action created an appreciable lessening of the reasonable expectation of privacy in the premises. The close proximity of the officer to the contraband from outside the premises and the defendant's knowledge of the officer's presence and his nervous reaction to the officer's observations of the contraband created exigent circumstances. That is, it became readily apparent to the officer that if the officer left and procured a search warrant prior to the seizure,

by the time he returned the contraband would most likely have been removed or destroyed. Since the officer did not have any reasonable non-intrusive method of preventing removal or destruction of the contraband during the period he would have had to be gone to obtain a warrant, it can be said it was not practical for him to obtain a warrant. His entry onto the premises and subsequent seizure of the contraband was therefore constitutionally reasonable and should be approved by this court under the "exigency exception" to the Fourth Amendment warrant requirement.

II.

A person properly under arrest has a diminished expectation of privacy under the Fourth Amendment to the United States Constitution. An officer in an arrest situation must be given sufficient latitude to not only control the arrestee but to protect himself and prevent potential evidence

from being destroyed. Accordingly, this court has allowed an arresting officer to not only search the person of an arrestee but to search the immediate area within control of the arrestee. A custodial arrest of a suspect upon probable cause is a reasonable intrusion under the Fourth Amendment and that intrusion being lawful, a search incident to the arrest requires no additional justification. In order to continue to have legitimate control over the arrested person, the officer must be authorized to accompany an arrestee to other areas and particularly to contemporaneously accompany an arrestee onto premises when the arrestee requests to be allowed to return to the premises for his own convenience and is permitted to do so. An arrested person should be afforded reasonable mobility.

The right of a law enforcement officer incident to an arrest of the person

to accompany the arrestee onto premises the arrestee has voluntarily returned to is not constitutionally dependent on the officer articulating some specific danger to himself or potential evidence or the probabilities in the particular arrest situation that weapons are present. To require such a showing would unduly interfere with a law enforcement officer's ability to do an adequate and effective job and interfere with his abililty to protect himself and potential evidence. The need to promote a police officer's safety is not less compelling simply because a person has been arrested for a minor criminal offense.

Therefore Officer Daugherty's contemporaneous entry upon the premises to accompany the arrestee was a constitutionally permissible adjunct to the arrest status of Mr. Overdahl. When the officer contemporaneously entered the premises and observed the contraband in "plain view",

he had authority to seize the same.

Additionally, the exclusionary rule should not be applied to the case at bar since the evidence seized was a product of the officer's "good faith" search and/or seizure of evidence.

ARGUMENT

I.

PURSUANT TO THE EXIGENCY EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT THE OFFICER HAD AUTHORITY TO ENTER THE PREMISES WITHOUT A WARRANT AND SEIZE THE ITEMS OF CONTRABAND OBSERVED BY HIM IN "OPEN VIEW" DUE TO THE EXIGENT CIRCUMSTANCES THAT EXISTED WHICH DID NOT AFFORD THE OFFICER A PRACTICAL OPPORTUNITY TO SECURE A SEARCH WARRANT.

A review of the appropriate portion of the Statement of the Case, page 13, reveals that the Washington State Supreme Court never decided the issue of whether or

not Officer Daugherty was or was not in the room at the time he originally saw the contraband and formed his probable cause to seize the contraband.

The record of the trial court and the opinion of the Court of Appeals indicate that Officer Daugherty was in fact not in the room (not on the premises) at the time he made his initial "open view" observations of the contraband. Instead, he was outside the room and located in the doorway (R.P. 7,8,21). The trial court in its Memorandum Opinion (J.A. 47) stated:

> Overdahl opened the door, which was slightly ajar, left it open and went inside for his identification. The officer stood in the doorway, and watched. Chrisman was in the room. The officer observed a pipe of a type known by him to be used for the smoking of marijuana and seeds which appeared to him to be marijuana seeds. He was familiar with marijuana and marijuana seeds. When Chrisman became aware of the officer he appeared to become nervous and upset. The officer then entered the room and examined the pipe and seeds closely. (emphasis mine)

The Court of Appeals observed in its opinion:

> Officer Daugherty watched the two occupants for a few moments before he saw a tray on a desk 8 to 10 feet from where he was standing; the tray contained seeds. A small pipe lay nearby which his experience led him to believe was used for smoking marijuana. At this point, Officer Daugherty entered the room, walked over and examined the seeds and pipe to verify that what he had observed was marijuana. (emphasis mine)

State v. Chrisman, 24 Wn.App. 385, 386, 600 P.2d 1316 October, 1979. (Pet.App. A, p. 22).

As the Court of Appeals additionally observed in State v. Chrisman at 389 (Pet. App. A, p. 27):

> It is undisputed that Mr. Overdahl pushed the door open and entered the room. In order to keep Overdahl within his view, the officer stood in the doorway looking into the room. There is no suggestion that Overdahl attempted to close the door once he had entered. Prior to entering the room, the officer saw from his vantage point in the doorway what he believed was contraband. Only at that time, did he cross the threshold and seize the pipe and marijuana seeds.

It is the position of the petitioner, hereinafter referred to as the State, that at the time Officer Daugherty made the observations he clearly was not in the room. Contrary to the statement by respondent on page two of his Brief in Opposition to Petition for Writ of Certiorari, the State does not maintain that the officer was in the room at the time of his initial observations. The State in fact does not posit that the officer was both in and outside the room, but simply is arguing that although the officer did not initially join Mr. Overdahl in entering the room, his subsequent entry was reasonably contemporaneous with Mr. Overdahl's entry. It is noted that Mr. Overdahl entered the room and left the door to the dorm room wide open; affording the officer a complete view of the room and totally exposing any expectation of privacy that the defendant

or Mr. Overdahl had in the room to being viewed by the officer who was standing in a public hallway. A discussion of the officer's entry into the room as an adjunct to the arrest status follows herein in the discussion beginning on page 53 as to the second question presented for review.

It is the State's position that as to the first issue presented for review, the Washington State Supreme Court improperly applied a post-intrusion exception to the warrant rule, that is, "the plain view doctrine"; see Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); to what in actuality was a situation that called for the application of both the pre-intrusion doctrine of "open view", Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069, 88 S.Ct. 992, and the "exigency exception" to the

Fourth Amendment warrant requirement.

Although the general rule is that a search without a warrant is per se unreasonable under the Fourth Amendment, Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), this court has delineated carefully drawn exceptions when the exigencies of the situation make the application of an exception warranted; Coolidge v. New Hampshire, supra, 403 U.S. at 455. When one looks at the totality of the circumstances facing the officer in the case at bar, it appears readily apparent that an immediate warrantless seizure of the items in "open view" was justified pursuant to the doctrine of exigent circumstances.

Such is particularly true in light of the reduction of expectation of privacy caused by Mr. Overdahl's rather casual exposure of the premises to Officer Daugherty.

It seems superficially technical to argue that the Fourth Amendment would protect against the seizure that took place by Officer Daugherty in the case at bar. The Fourth Amendment really protects people, not places, that is, a person's reasonable expectation of privacy in a place as opposed to protecting the place. In Katz the court stated:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 US 206, 210, 17 L ed 2d 312, 315, 87 S Ct 424; United States v. Lee, 274 US 559, 563, 71 L ed 1202 1204, 47 S Ct 746.

Katz v. United States, supra, 389 U.S. 351, 19 L.Ed.2d 582.

It should be remembered when considering the situation that gave rise to the exigent circumstances which faced the officer, that the officer did not go to the room to fulfill his own purposes, but to

allow Mr. Overdahl to effectuate a more timely release from custody by properly proving his identity. The officer was attempting to handle the situation in a "low-key" fashion (J.A. 28-29). The officer did not allow Mr. Overdahl to return to his room for any purpose other than to allow Mr. Overdahl to obtain identity. It was Mr. Overdahl's choice to expose the privacy of his and the defendant's room to view of the officer. The officer was not involved in any sham or pretext to search.

It is clear that prior to entering the room the officer had probable cause to believe, based on his training and experience, that what he was viewing, in "open view", was a controlled substance.

This court has recognized that there are circumstances under which a police officer may enter a private residence without a warrant and search. In U.S. v.

Jeffers, 342 U.S. 48, 51-52, 72 S.Ct. 93, 96 L.Ed. 59 (1951), this court acknowledged that exigent circumstances may allow the entry into a private residence to seize evidence without a warrant. An exigent circumstance cited by the court in Jeffers would be the need to prevent the destruction of evidence. This principle is likewise acknowledged, although not applied, in Vale v. Louisiana, 399 U.S. 30, 35, 26 L.Ed.2d 409, 90 S.Ct. 1969 (1970). Although this court in Vale v. Louisiana, supra, did find in the particular factual situation that there were not exigent circumstances justifying warrantless arrest, the court did observe, in commenting on the officers' actions:

> There is thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well.

399 U.S. 35, 26 L.Ed.2d 414.

In Vale v. Louisiana, supra, the officers arrested an individual outside his residence and attempted to use that as justification for a search of the residence. It is clear that the officer in the case at bar did not intend to use the arrest of Mr. Overdahl as a basis to search Mr. Overdahl's premises. He only entered the premises and seized the contraband in question when he was confronted with the exigencies of the moment.

In Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948), this court, while generally upholding the requirement of the need for a warrant before permitting the search of a private premises, nevertheless acknowledged:

> There are exceptional circumstances in which on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for a search may be dispensed with.

333. U.S. at 14, 15, 92 L.Ed. 440-441.

It appears the reason this court did not excuse the acquisition of a warrant in Johnson v. United States, supra, was that no reason was shown for not first obtaining a search warrant except the inconvenience of the officers and slight delay that would have been occasioned by obtaining the same. In Johnson v. United States, supra, the officers in fact created their own exigency by unnecessarily acting on the "open smell" observations which gave them probable cause in lieu of presenting their probable cause to an impartial magistrate. The initial "open smell" observation did not need to come to the defendant's attention. In the case at bar, of course, Officer Daugherty did not consciously put himself in that position; his conduct was reasonable in accompanying the individual he had under arrest up to the doorway of the dorm room. It was Mr. Overdahl's con-

duct in leaving the door open and allowing a full "open view" of the premises in conjunction with the obvious realization thereafter by all parties present that the officer had seen contraband that created the exigency. At that juncture the officer had really no choice but to enter the premises and seize the items of contraband. It cannot be realistically suggested that he could simply have gone to obtain a warrant with any reasonable expectation that the contraband would still be available upon his return. Clearly, had Officer Daugherty left, the contraband he had observed would be threatened with removal or destruction. Common sense tells us that much. Therefore, the application and reasoning expressed by this court in Johnson v. United States, supra, would justify the dispensing with a magistrate's warrant.

The Court of Appeals in rendering its decision in the case at bar observed:

> . . . Officer Daugherty's observation of the pipe and seeds was a preintrusion 'open view' observation from the doorway of Overdahl's room which, like the driveway in State v. Daugherty, supra, was a semi-private area. Unlike the facts in Daugherty, exigent circumstances existed here. Because the drugs could have been readily disposed of while the police officer was trying to obtain a search warrant, sufficient exigent circumstances existed to justify the seizure.

24 Wn.App. 390 (Pet.App. A, p. 29).

In order to determine that exigent circumstances did not exist would require one to ignore the realities of human nature and the reasonable probabilities of everyday life. Officer Daugherty's observation of the contraband in the room and the defendant's reaction to Officer Daugherty's presence were such that it is reasonably apparent that if Officer Daugherty had left the premises immediately after observing the seeds and pipe and attempted to secure search warrants, the contraband would likely have been des-

troyed during the interim; see the trial court's oral observation (J.A. 33).

This court has held that where an officer has probable cause a warrantless search and/or seizure is authorized if it is not practical to secure a warrant because the nature of the circumstances would jeopardize the continuing availability of the evidence. When the attending circumstances make the officer's ability to control the evidence fleeting and impracticable, it appears this court has held that the circumstances are tantamount to being exigent; see Chambers v. Maroney, 399 U.S. 42, 48-49, 26 L.Ed.2d 419, 426-427, 90 S.Ct. 1975 (1970). Although Chambers v. Maroney, supra, involved a warrantless search of an automobile, it appears in effect that this court has said that in the right circumstances, the mobility of the automobile is what verifies the impracticability of obtaining a warrant. Potential mobility is

the aspect of the situation which creates the exigent circumstance which has led this and other courts to sanction warrantless searches where such would not normally be sanctioned as to a residence. Therefore, although cases such as Chambers v. Maroney, supra, and Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925), involve warrantless searches of automobiles, they do appear to underscore the premise that where it is impracticable to obtain a warrant and the officer does have probable cause upon which to base the search and/or seizure, that such should be sanctioned pursuant "exigent circumstance".

In balancing the interests of the public to be protected against the commission of a crime with the interests and rights of an individual citizen to be free from unreasonable searches and seizures, it is hard to imagine that at the time the Fourth Amend-

ment was adopted that such conduct as occurred in this case would have been considered an unreasonable seizure. As this court observed in Carroll v. United States, supra:

> The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

267 U.S. 147, 69 L.Ed. 543.

Additionally, in Carroll v. United States, supra, the court observed:

> The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interest and rights of individual citizens.

267 U.S. 149, 69 L.Ed. 549.

This court additionally noted:

> In cases where the securing of a warrant is reasonably practicable, it must be used, . . . (emphasis mine)

267 U.S. 156, 69 L.Ed. 552.

It is in this context that the holding in Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980), is particularly germane and significant. Although in Colorado v. Bannister, supra, this court again dealt with the warrantless search of an automobile, in many ways the case is factually similar to the case at bar. The officer in Colorado v. Bannister, supra, was making a routine traffic stop and from the doorway of the vehicle observed property appearing to be contraband from a recent reported theft of auto parts. The officer arrested two occupants of the vehicle outside the vehicle and entered the vehicle to seize the items without a warrant; that is, the items that had been seen in "open view". The court observed that under the judicial philosophy expressed in Carroll v. U.S., supra, and Chambers v. Maroney, supra, the circumstances provided not only

probable cause to arrest but probable cause to seize the incriminating items without first obtaining a warrant. The court, in footnote 2, 101 S.Ct. 43, noted:

> As the reason for the stop was wholly unconnected with the reason for the subsequent seizure, it would be especially unreasonable to require a detour to a magistrate before the unanticipated evidence could be lawfully seized.

It is important to again note in the case at bar that Officer Daugherty's purpose for being present near the doorway of the defendant's and Mr. Overdahl's room was totally unconnected with the ultimate seizure. It is clear that the officer did not anticipate that he would be seeing the contraband. There is obviously no indication that the officer's actions in accompanying Mr. Overdahl to the room were any type of pretext; in fact it could not have been because the officer had no reason to believe there were drugs in the room, he

was simply accompanying Mr. Overdahl back to his room after Mr. Overdahl suggested that he retrieve his I.D. from his room. As to pretext, see footnote 4, Colorado v. Bannister, supra, 101 S.Ct. 44.

See also State v. Patterson, 192 Neb. 308, 220 N.W.2d 235, 240 (1974), wherein the Nebraska State Supreme Court ruled that where information in possession of the officer leads to the conclusion that a crime is being committed in the residence and the officer has evidence which indicates that there is a great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist.

In Coolidge v. New Hampshire, 403 U.S. 443, 460-461, 29 L.Ed.2d 564, 579, 91 S.Ct. 2022 (1971), there were several important factors that caused the court to find that

no exigent circumstances existed. The defendant in question was separated from the automobile that was sought to be searched under exigent circumstances and had no possibility of access to it. There was no evidence that the items to be seized were contraband nor readily disposable. The defendant's wife and their baby were required to spend the night elsewhere. Two guards were placed on the premises to avoid anyone gaining entrance to the premises and tampering with potential evidence. Also, the officers had sufficient forewarning of the situation with attending probable cause that they could have, had they made the effort, practically obtained a warrant. The case is clearly distinguishable from the situation in the case at bar.

The practicality of obtaining a warrant should not be viewed in an artificial

light. In the case at bar it was neither realistic nor practical for the officer to have obtained a warrant. This court has indicated in Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), that reasonableness is not judged entirely on the fact that a "less intrusive" means of seizing evidence could have been used. This court has observed:

> While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable. Cf. Chambers v Maroney, supra.

413 U.S. 447, 37 L.Ed.2d 718.

This court in Cady v. Dombrowski, supra, acknowledged that a warrant is not necessary where evidence could easily be

moved or destroyed before a warrant could be secured.

A study of Cady v. Dombrowski, supra, makes it clear that there are no "hard and fast" rules as to when a recognized exception to the warrant requirement will apply. The question of when a warrant is required must be answered by examining the facts of each individual case that comes under the scrutiny of the court. The ultimate standard set forth in the Fourth Amendment is a standard of reasonableness. This court observed in Cady v. Dombrowski, supra, in making reference to the general rule allowing for a warrantless search:

> While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

413 U.S. 440, 37 L.Ed.2d 714.

The defendant in his Brief in Opposition to Petition for Writ of Certiorari at page 10 relied on Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978). Mincey v. Arizona, supra, is clearly distinguishable factually from the case at bar. In that case the state tried to justify an extensive and complete four day search of the entire apartment where a homicide had taken place without showing that such a search was justified either by exigent circumstances or some other specifically established and well delineated exception to the warrant requirement. There was no showing of exigencies or even a pretense that exigencies existed. This court noted:

> The Arizona Supreme Court did not hold that the search of the petitioner's apartment fell within any of the exceptions to the warrant requirement previously recognized by this court, but rather that the search of the homicide should be recognized as an additional exception.

437 U.S. 390, 57 L.Ed.2d 299.

It is clear that in Mincey v. Arizona, supra, this court simply decided that it was not going to create a "homicide scene" exception to the warrant requirement. It is interesting to note that in Mincey v. Arizona, supra, this court did recognize that officers may need to make a warrantless entry and search of a premise when there is some exigent circumstance. The officers in Mincey v. Arizona , supra, ran afoul of the constitution when they wanted to expand their initial search to a four day complete search of the apartment. The court noted that:

> But a warrantless search must be 'strictly circumscribed by the emergencies which justify initiation,' Terry v. Ohio, 392 U.S.1 at 25-26, 20 L.Ed.2d 889, 88 S.Ct. 1868, 44 Ohio Ops 2d 383, and it simply cannot be contended that this search was justifed by any emergency threatening life or limb.

437 U.S. 393, 57 L.Ed.2d 300.

It is clear in the case at bar that had Officer Daugherty subsequent to his entry on premises and seizure of the contraband in open view gone on to conduct a full search of the dorm room prior to obtaining a search warrant or obtaining consent from the occupants, that a situation proscribed by Mincey v. Arizona, supra, would then be present. This writer appreciates that an exigent circumstance does not exist simply because it would be easier for the officer to proceed without a warrant. It is submitted, however, that in the case at bar there were no realistic or practical alternatives to the officer entering the premises and seizing the contraband. In this regard, as observed in Mincey v. Arizona, supra:

> The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights

> that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. See United States v Chadwick, 433 US 1, 6-11, 53 L Ed 2d 538, 97 S Ct 2476. For this reason, warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. McDonald v United States, 335 US 451, 456, 93 L Ed 153, 69 S Ct 191; Johnson v United States, 333 US 10, 14-15, 92 L Ed 436, 68 S Ct 367.

437 U.S. 436-437, 57 L.Ed.2d 301.

Also, this court observed:

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case, as, indeed, the Arizona Supreme Court recognized. 115 Ariz, at 482, 566 P2d, at 283. There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained.

437 U.S. 394, 57 L.Ed.2d 301.

In Mincey v. Arizona, supra, at 437 U.S. 394, 57 L.Ed.2d 30, this court discussed the presence of exigent circumstances which would justify a warrantless search or seizure. The court in affect indicated that exigent circumstances would be deemed to exist if it was shown that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. The defendant in his Brief in Opposition to Petition for Writ of Certiorari, argues that there were no exigent circumstances existing in the case at bar because a guard could have been posted on the dorm room and alleviated the existence of exigencies during the time that would have been required to obtain a search warrant. Of course Mincey is distinguishable from the case at bar because in that case the officers did not already have an "open view" of the evidence they wished to seize. It seems a strained

analysis to suggest that that which has already been voluntarily exposed to view of the officers cannot be seized without the procurement of a warrant when the occupants are aware of the officer's presence and remain on the premises.

The defendant's suggestion, in his Brief in Opposition to Petition for Writ of Certiorari, that the posting of a guard could effectively eliminate exigencies pending the time necessary for procurement of a warrant when placed under close and logical scrutiny, would create a "Catch 22" situation for the officer involved in the case at bar. In order to do a reasonable job as a law enforcement officer, Officer Daugherty had to do something reasonably calculated to secure the status of the contraband; that is, to keep it from being jeopardized during his absence if he were going to leave to obtain a warrant. How

would he have gone about effectively utilizing a guard to either remove the occupants of the premises, control the activities of the occupants of the premises, or to require the continuing invasion of their privacy by requiring the door to the dorm room to remain open pending the procurement of a warrant if exigencies did not exist for the guard to either enter the premises or otherwise take active control of the activities on the premises or of the people on the premises; see Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). In order to preserve the situation and eliminate the existence of exigencies, the very privacy which the Fourth Amendment purports to protect would have to be totally violated in order for the officer to effectively control the situation. To constitutionally accomplish such would require in itself a showing of "exigent circumstances".

One wonders what privacy interest or expectation of privacy interest would really remain to be protected by the Fourth Amendment during the period during which by necessity the normal expectation of privacy of the occupants would be totally supplanted in order to create a reasonable time during which a magistrate could review the probable cause to issue a warrant. In this case the period required would have been approximately two hours (R.P. 38; J.A. 18). The officer in the case at bar already had the contraband in question in "open view", was in close proximity to the same and had been allowed by one of the occupants of the room to be both in close proximity and have it in view. To effectively control the situation at the minimal the officer would have to do something that would continue to expose the object of his seizure to close and continuing scrutiny. In such a setting, how can any-

thing more than a bare minimal legitimate expectation of privacy remain to be protected or actually be protected by requiring the acquisition of a warrant prior to any seizure. Although the enigma and dilemma created by the defendant's suggestion of posting a guard is a fascinating one for legal technicians to "toy with", it is a suggestion that has very little practical utility in everyday life and does really nothing to prevent unreasonable searches and seizures since effective and meaningful implementation of the suggestion by its very nature would destroy instead of preserve any privacy right.

It appears the distinction between allowing the officer to enter the premises and seize the contraband in "open view" or to seize the persons and remove them from the premises and then secure the premises while waiting the acquisition of the search warrant or to require their privacy to

continue to be exposed by requiring the dorm room door to remain open or to control their activities inside the premises, is of little constitutional significance. To say that implementation of any of these approaches would result in more or less of a constitutionally significant action than implementation of the other remaining options in light of the situation where the contraband is in open view and exposed to the officer's view, would be at best a highly technical application of the provisions of the Fourth Amendment. In Warden v. Hayden, 387 U.S. 294, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967), this court spent a significant portion of the opinion explaining that the exigent circumstances doctrine could apply to mere evidence as well as the apprehension of a fleeing suspect. Therefore it does not appear of any controlling significance that the police officer in the case at bar seized evidence

rather than seized a person.

It appears that the least intrusive means of ultimately seizing the contraband in question was for the officer to enter the premises and immediately seize the same as opposed to attempting to fashion some method that would have required an ongoing invasion of privacy to the occupants of the premises during the approximate two hour period it would have taken to obtain a warrant. However, this court should not adopt a philosophy that sanctions only the least intrusive method for effectuating a seizure. This court should permit any reasonable method of search and seizure; see discussion on Cady v. Dombrowski, supra, at pages 39-40 herein. This court has permitted seizures otherwise covered by the Fourth Amendment which constituted less of an intrusion where the circumstances rendered such reasonable; see Michigan v.

Summers, ___U.S.___, ___ L.Ed.2d ___, ___ S.Ct. ___, 49 U.S.L.W. 4776, Docket No. 79-1794 (Decided June 22, 1981).

It is clear then by a reasonable analysis and application of the two concepts of "exigent circumstances" and "reasonable expectation of privacy" that the officer's actions in this case were justified by the circumstances and did not amount to an unreasonable violation of a legitimate constitutional expectation of privacy. The seizure was not constitutionally "unreasonable". The officer, who had probable cause, simply did not have a practical opportunity to obtain a warrant prior to the seizure of the contraband in question.

II.

AN OFFICER MAY MAKE A CONTEMPORANEOUS ENTRY INTO PREMISES TO ACCOMPANY AN INDIVIDUAL WHO IS UNDER ARREST STATUS WHEN THAT INDIVIDUAL REQUESTS AND IS GIVEN PERMISSION TO RETURN TO SAID PREMISES SINCE SUCH AN ENTRY BY THE OFFICER IS NECESSARY IN AN ARREST SITUATION AND THEREFORE NOT AN UNREASONABLE SEARCH OR SEIZURE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In addition to the officer having authority to enter the premises pursuant to "exigent circumstances", it is the State's position that the officer had authority to contemporaneously enter the premises with the arrestee and thereafter then being on the premises to make the seizure of the contraband pursuant to the "plain view doctrine".

It is clear that Officer Daugherty, at the time he allowed Mr. Overdahl to return to his room, had Mr. Overdahl in

custody and under arrest. Concerning Mr. Overdahl's arrest status, the Washington State Supreme Court observed:

> We begin by stating the trial court correctly determined Overdahl had been placed under arrest at the time he was apprehended outside Orton Hall carrying the bottle of gin. Overdahl continued to be under arrest when he was accompanied to his room by Officer Daugherty. As the State observes, there was nothing to prevent Officer Daugherty from accompanying Overdahl to his room.

State v. Chrisman, 94 Wn.2d 711, 716 (Pet.App. B, p. 38); see also the Court of Appeals Opinion (Pet.App. A, pp. 24-26)

The Washington State Supreme Court in this case held that the "plain view doctrine" did not apply since the State did not satisfy the first prong of that doctrine which required a showing that there was "a prior justification for intrusion"; see Coolidge v. New Hampshire, 403 U.S. 433, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). In the majority opinion the Washington State Supreme Court reasoned that the arrest

status of Mr. Overdahl, although accompanied with a request by him to return to his premises to secure identification, did not afford the officer a reasonable basis to accompany him onto the premises. The majority would require that the officer secure a warrant, and/or presumably consent, prior to his entry on the premise.

It is the State's position that it was reasonable for the officer to accompany Mr. Overdahl on the premises even though his entry on the premises was not simultaneous but rather contemporaneous with the entry of Mr. Overdahl. Only approximately 30 to 45 seconds elapsed from Officer Daugherty's arrival at the door of Mr. Overdahl and the defendant's dorm room and the officer's entry onto the premises. Although there are general policy reasons for always allowing an officer to accompany an arrestee who has been permitted to volun-

tarily return to his premises which will be discussed later in this argument, it is noted that there are some particular factors that additionally add to the reasonableness of the officer's conduct in this particular situation.

First of all, when Mr. Overdahl entered the dorm room, both his and the defendant's reasonable expectation of privacy was substantially reduced by Mr. Overdahl's leaving the door to the premises wide open and exposing the approximately 11 by 17 room and its contents and occupants to a fairly full view of the officer. Additionally, the record indicates that although the officer could fairly well keep Mr. Overdahl in sight, he could not entirely determine what he was doing or what items he had access to while Mr. Overdahl was attempting to locate his identification (J.A. 22).

Although the Washington State Supreme

Court in this matter appears to interpret the United States Constitution as prohibiting the entry of Officer Daugherty onto the premises pursuant to accompanying the arrestee, it cites no convincing authority for said proposition. It is the State's position that the United States Constitution does not prohibit a police officer from accompanying an arrestee to his premises, room, dwelling or other location when such a person, legally in custody, asks to be given access to such an area. See State v. Brown, 132 N.J.Super. 180, 333 A.2d 264 (1975). For authority from courts of other jurisdictionsin analogous situations, see United States v. Mason, 523 F.2d 1122, 1126 (D.C.Cir., 1975); United States v. Wright, 577 F.2d 378, 381 (6th Cir., 1978); United States v. DeMarsh, 360 F.Supp. 132, 137, n.4 (E.D.Wis., 1973). It appears clear that once the officer has a defendant in his control

the officer is authorized to accompany the defendant to other areas. See United States v. Distefano, 555 F.2d 1094, 1101 (2nd Cir., 1977); Moffett v. State, 291 A. 382, 281 So 2d 630 (1973), cert denied 414 U.S. 1161, 39 L.Ed.2d 114, 94 S.Ct. 924 (1974); People v. Stevens, 38 Cal.App.3d 66, 113 Cal.Rptr. 49 (1974); People v. Green, 14 Ill.App.3d 972, 304 N.E.2d 32 (1973), cert. denied, 417 U.S. 972, 41 L.Ed.2d 1143, 94 S.Ct. 3179 (1974); People v. Mann, 61 Misc.2d 107, 113, 305 N.Y.S.2d 226 (1969).

Not to allow officers to accompany an arrestee is to conversely and indirectly encourage officers not to allow an arrestee to move freely to other areas for fear the officer may later be "second guessed" by a reviewing court and advised that the Fourth Amendment would require a search warrant to allow the officer to accompany the mobile arrestee. Such a position would appear to

encourage a situation that would discourage allowing arrestees reasonable mobility. In the case at bar the arrestee asked to be able to return to his room. It is submitted that our system of law should encourage officers to allow an arrestee as much reasonable freedom of movement as possible, provided it does not otherwise interfere with the officer's ability to control his arrestee and perform his functions, as well as protecting himself and his fellow officers and society.

In this case Officer Daugherty simply tried to allow the arrested suspect sufficient mobility to produce identification in an attempt to expedite the suspect's release. The officer must have corresponding authority to accompany his arrestee, with the "plain view doctrine" expanding to correspond with the necessities of the situation. See United States v. Griffith,

537 F.2d 900, 905 (7th Cir., 1976); United States v. Mason, 523 F.2d 1122, 1125-1126 (D.C. Cir., 1975) (by implication); see particularly a detailed discussion contained at pages 420-424, Sec. 6.4, Vol. 2 of Search and Seizure, A Treatise on the Fourth Amendment, by Wayne R. LaFave, West Publishing Company (1978).

It is noted that allowing Mr. Overdahl to return to his eleventh floor dorm room to retrieve his ID to more smoothly effectuate his ultimate release was a matter of personal convenience to Mr. Overdahl. It appears there is very little distinction between allowing Mr. Overdahl to return for his ID and the analogous situation of allowing him to return for another item of personal property, such as a coat or other articles of clothing; see State v. Brown, 132 N.J.Super. 180, 333 A.2d 264 (1975).

It does not appear that this Court

has ever in any definitive fashion determined the precise issue presented for review in this case. However, the Washington State Supreme Court's ruling in this matter seems to be at least philosophically in conflict with the courts of other state jurisdictions. The Alabama Supreme Court in Moffett v. State, 291 Ala. 382, 281 So.2d 630, 632 (1973), cert. denied 414 U.S. 1161 (1974), held that an officer was permissibly in the bedroom and the seizure of the pistol in plain view was permissible since the officer had a right to be where he was, tacitly approving the officer's ability to accompany an arrestee to another portion of the premises. Moffett v. State, supra, involved a situation where the defendant was arrested without a warrant at the door of his premises and requested of the officer that he be permitted to go into the bedroom on the premises

where he was allowed to go but was followed and accompanied by the arresting officer. After entering the bedroom, the officer saw a pistol in plain view. Additionally, in People v. Green, 141 Ill.App.3d 972, 304 N.E.2d 32, 40 (1973), cert. denied 417 U.S. 972 (1974), the Illinois court allowed an officer to accompany a defendant onto the premises (his YMCA room) when the defendant asked to be allowed to voluntarily return to the premises.

It is submitted that the Washington State court in its analysis of why it was not necessary for Officer Daugherty to accompany Mr. Overdahl onto the premises sets an artificial standard for determining that necessity. The Washington State Supreme Court stated:

> There is absolutely no evidence that it was necessary for Officer Daugherty to enter the room to seize a weapon which might be used in an assault, that the bottle of gin was about to be destroyed, or that Overdahl was going to attempt

> to escape. It was a small room. Officer Daugherty was standing in the one exit, and it was on the 11th story. It was not necessary for the officer to enter the room to make certain Overdahl secured his identification.

94 Wn.2d 717, Pet.App. B, p. 39.

It is submitted that the point of view expressed by the Washington State Supreme Court is unrealistic if a law enforcement officer is expected to do a competent job. What an arrestee may or may not do in any given situation to jeopardize evidence or the safety of an officer or others is simply too unpredictable. What the Washington State Supreme Court seems to be suggesting is that the officer is not allowed to place reasonable restrictions and supervision on the movement of an arrestee unless he can articulate some specific danger to himself or potential evidence. The problem with this approach is that too often by the time an officer would realize the danger to the

evidence or his person, it would be too late to do anything effective about it. An officer, in order to do an effective job and protect himself, must be permitted some reasonable constitutional latitude to take precautionary measures in the exercise of his function, particularly as such relates to the supervision, control and custody of an arrested individual. Human nature being what it is and the seeming increase in our society of bizarre behavior in response to an arrest even for minor violation; e.g. minor traffic citations; makes it imperative that the courts do what they can to afford officers reasonable latitudes in controlling arrested persons. It is difficult to say with any degree of certainty that the need for police safety is less compelling simply because the person is under arrest for a minor crimianl offense; see Pennsylvania v. Mimms, 434 U.S. 106, 109-110, 54 L.Ed.2d

331, 336-337, 98 S.Ct. 330 (1977). Surely permitting an officer to accompany the arrestee onto premises that the arrestee has voluntarily returned to is no more of an intrusion upon the arrested person's right to be secure from unreasonable searches and seizures than say for example, a custodial search pursuant to a traffic arrest.

By analogy, this court has in the past afforded officers broad authority to search the person of an arrested individual to prevent the destruction of evidence and to protect the officer without requiring the officer to define with specificity or otherwise articulate any particular circumstances in the situation which justified the search. In short this court has allowed an arresting officer to not only search the person but to search the immediate area within the control of the arrestee, not only to

avoid the destruction of evidence but to protect the officer. Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969); United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973); and Gustafson v. Florida, 414 U.S. 260, 38 L.Ed.2d 456, 94 S.Ct. 488 (1973). It makes little sense to say just because Mr. Overdahl was arrested outside his premises and was allowed to return to his premises that the officer should not be allowed to accompany him onto the premises to effectuate the officer's continuing protection. The officer obviously had no way of knowing whether Mr. Overdahl would attempt to escape or would have an opportunity to procure a weapon (or an item that could be used as a weapon against the officer) from his premises. It is not the likelihood of Mr. Overdahl doing such a thing that seems constitutionally significant, but rather the

fact that common experience teaches us that such is a probability that a law enforcement officer cannot afford to ignore. Officers must be afforded a reasonable opportunity to protect themselves.

This court in United States v. Robinson, supra, stated:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an excep-

> tion to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment. (emphasis mine)

414 U.S. 235, 38 L.Ed.2d 440-441.

It is submitted that Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), which was cited by the Washington State Supreme Court in its opinion in this matter, is not particularly helpful because it is distinguishable in that it deals with an entry into a private residence for the purposes of effectuating an arrest as opposed to dealing with the question of an officer's authority over an arrestee who is allowed to return to his premises once the arrestee is in custody.

It appears then that Officer Daugherty's entry upon the premises was constitutionally permissible as an adjunct to the arrest status of Mr. Overdahl who had voluntarily returned to the premises in question.

Since the officer had authority to

enter the premises, he had authority to seize the contraband in "plain view"; see Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

Even if this court should conclude that the conduct of Officer Daugherty in entering the premises and seizing the contraband was tantamount to an unreasonable search and seizure, it is submitted that the exclusionary rule should not be applied to the case at bar. The evidence seized is the product of an officer's "good faith" search and/or seizure. This court stated in United States v. Peltier, 422 U.S. 531, 542, 45 L.Ed.2d 374, 384, 95 S.Ct. 2312 (1975):

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol

> searches by the federal judiciary was overturned by this Court's decision in Almeida-Sanchez. But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that the respondent's Fourth Amendment rights were violated by the search of his car. (emphasis mine)

CONCLUSION

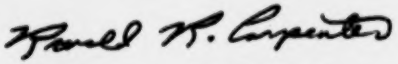
It is submitted that the original seizure of the contraband by Officer Daugherty was permissible pursuant to the "exigency exception" to the warrant requirement of the Fourth Amendment. It was additionally permissible as a "plain view" seizure which followed the officer's permissible entry onto the arrestee's premises to accompany the arrestee. The search and seizure by Officer Daugherty was also a "good faith" search and seizure to which

the exclusionary rule should be not be applied. The subsequent consent to search given by the defendant to the officers was not obtained through exploitation of the defendant's Fourth Amendment rights nor was it otherwise the product of an illegal search and seizure and therefore was valid. Consequently, both the evidence originally seized by Officer Daugherty when he first entered the room and the evidence seized as a product of the search and seizure conducted on the authority of the properly obtained consent to search given by the defendant to the officers were improperly suppressed by the Washington State Supreme Court.

The judgment of the Washington State Supreme Court, insofar as it suppressed the evidence and reversed the conviction of the defendant, NEIL MARTIN CHRISMAN, the respondent herein, should be reversed; the decisions of the trial court and the Washington

State Court of Appeals should be affirmed and reinstated.

Respectfully submitted,



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No. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

v.

NEIL MARTIN CHRISMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. If the highest State Court's ruling can be fairly interpreted as applying State law, and if the State law, as applied, would afford an individual more constitutional protection than that afforded under the Federal Constitution, should the U.S. Supreme Court hear the matter?

2. Where a police officer accompanies an arrestee to the arrestee's residence to obtain evidence by virtue of a testimonial act, without giving the arrestee Miranda warnings, and thereby obtains the opening of the residence door by the person arrested, is the police officer where he has a right to be so

that the "plain view doctrine" or the "open view doctrine" will apply?

3. Where a police officer accompanies an arrestee to the arrestee's residence to obtain evidence by virtue of a testimonial act without first giving the arrestee Miranda warnings, and thereby obtains the opening of the residence door by the person arrested, has the arrested person voluntarily surrendered the privacy of his residence?

4. When a police officer is standing outside the residence of an arrested individual, the door having been opened by the arrested individual as a result of the police officer's desire to obtain evidence from that individual, may the police officer, without a search warrant,

enter the residence to examine more closely items which the police officer believes may be contraband?

5. Where an occupant of the residence appears nervous when he sees the police officer at the open door and the police officer believes he sees what might be a controlled substance in the residence, but there is no effort on the part of any of the occupants to destroy the item or items which have come to the attention of the police officer, no efforts are made to escape, and the officer has means to maintain the status quo pending an attempt to obtain a search warrant, are circumstances sufficiently exigent to justify the entry into a single room residence by a police officer without a search warrant?

6. Must an officer announce his purpose to enter a residence before entering a residence where the occupants know of the officer's presence at the doorway and know his identity but do not know of his intention to enter the residence?

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OPINIONS BELOW

Respondent accepts Petitioner's statement as to the opinions below set forth at page 1 of Petitioner's brief.

JURISDICTION

Respondent accepts the Petitioner's statement of jurisdiction as set forth at pages 1 and 2 of Petitioner's brief. Respondent, however, calls the Court's attention to the proposition that, as stated below, this Court would have no jurisdiction to modify the Washington State Supreme Court's interpretation of the Washington State Constitution where that interpretation gives the individual more protection than the Federal Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED IN REVIEW

The Federal Constitutional provision involved in review is the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Washington State Constitutional provision, on which the Washington Supreme Court could have based its decision below, is Article 1, Section 7, which states as follows:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

I.

The Washington Supreme Court could be affirmed by this Court ruling that the Washington Supreme Court based its decision on the Washington Constitution, rather than the Federal Constitution.

II.

The police officer, by violating the constitutional rights of Mr. Overdahl in failing to advise him of his Miranda rights, obtained Mr. Overdahl's presence at the doorway and further procured the opening of the door which had been only slightly open previously. Further, the facts of this case do not disclose a voluntary consent on the part of Mr. Overdahl to the presence of the police officer at the door. By opening the door subsequent to a violation of his constitutional rights, Mr. Overdahl did not voluntarily surrender his right to privacy, nor did Respondent. Since neither of the occupants of the dormitory room surrendered their right to privacy, the police officer had no right to be in a position to examine possible contraband through the door which had been opened.

III.

The search and seizure cannot be justified under the plain view doctrine since the police officer, at the time he made the observation, was not inside the protected area. Moreover, if the police officer is determined to have been in the room, the police officer was not where he had a right to be, since he was at his location as a result of violating the constitutional rights of Mr. Overdahl. Further, the plain view doctrine does not apply because, when the police officer initially saw the seeds, he did not know that he had seen contraband, as demonstrated by the fact that he went in to take a closer look, rather than to actually seize the contraband. Finally, the officer did not articulate a need to be where he was merely because Mr. Overdahl had been placed under arrest.

IV.

The entry into the premises cannot be justified as necessary because of exigent circumstances, since the premises were, for all intents and purposes, under the control of the police officer from the time he saw the seeds. There was never any effort to destroy evidence and, indeed, the police officer could have prevented any destruction of the evidence, pending a search warrant. The walkie-talkie which was in working condition put the police officer in close communications with other police officers who could render assistance in securing the premises pending the arrival of a search warrant.

V.

The search is also invalid because the police officer should have announced

his intention to enter to pick up the seeds before doing so. Thus, he violated the knock and announce rule.

VI.

The Court should not entertain the invitation to modify the exclusionary rule since it has been raised for the first time on appeal. The Court should maintain the exclusionary rule because it has not been shown to have unduly hampered law enforcement officers, and because the reasons advanced for abolishment of the exclusionary rule do not withstand analysis, although no effort will be made in this brief to address each point raised in opposing briefs. Moreover, those who propose to abolish the exclusionary rule lose sight of the proposition that the government should follow its own rules and should

not use evidence which it had no right to acquire in the first instance.

ARGUMENT

I.

QUESTIONS PRESENTED AS FRAMED BY THE PETITIONER ARE NOT THE ISSUES ON WHICH THIS CASE SHOULD BE DECIDED.

The questions presented as framed by the Petitioner are not the real issues on which this case should be decided. The issues in this case, as framed by the Petitioner do not conform to the facts in this case.

In the first instance, Mr. Overdahl was not "allowed" to return to his room. He was not the initiating party in an effort to get to his room. In this connection, the Petitioner's assertion that Mr. Overdahl went to his room for

his own convenience, and that he somehow gave up his right to privacy by opening the door to his room, makes about as much sense as a robber asserting that there was no robbery because the purported victim voluntarily parted with his money in response to the robber's proposition: "Your money or your life." Obviously, the victim, in parting with his money, did not do so voluntarily, but did so in order to save his life, or at least to keep his body from harm. In this instance, Mr. Overdahl volunteered to go to his room, not because he wanted to go to his room, but because he needed to do so in order to placate a police officer's desire for identification which would provide proof of age.

Thus, the factual basis on which the Petitioner's first purported issue is framed is not consistent with what

actually occurred.

It also should be noted that not only was Mr. Overdahl's return to his room involuntary in fact, it was involuntary in law, since he had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) and he consented to return to his room as a result of the coercive effect of his arrest. Thus, all of the cases cited by Petitioner from pages 57 through 63 of Petitioner's brief have no application. In every one of Petitioner's cases, entry into the protected area was initiated by the suspect for a purpose of his own or as a result of a need to clothe the arrestee, but not to obtain evidence. This is a material departure from the facts of the case at bar and one which Petitioner makes no effort to reconcile.

The second issue, as framed by the Petitioner, is similarly inconsistent with what actually occurred. Mr. Overdahl didn't "ask" to be given access to his dwelling. The need for Mr. Overdahl's re-entry into his dwelling was a result of the police officer's unlawful request for evidence of Mr. Overdahl's age without having previously advised Mr. Overdahl of his Miranda rights and the exploitation of the arrest situation. (J.A. 8, 9). Moreover, as acknowledged by Petitioner, the police officer did not accompany Mr. Overdahl into his room. (J.A. 11). Mr. Overdahl was accompanied only as far as the doorway. The officer did not go into the room as an adjunct of the arrest of Mr. Overdahl. Neither did the officer go into the room to make an arrest. The officer went into the room solely because he saw what he thought

might be contraband and wanted to take a closer look. (J.A. 23, 24, 25).

The constitutional questions presented to this Court are those that have been consistently presented by Respondent throughout these proceedings in substantially the form presented below, although articulated slightly differently as the arguments become more refined.

Although Respondent did not cross-petition for certiorari, it is respectfully submitted that under Supreme Court Rule 10.5 the Court can address questions which support the decision of the lower Court, even though the decision is affirmed on grounds other than those asserted by the State Court. With that in mind, Respondent shall discuss below all constitutional issues which Respondent believes fully justify the State Court's decision.

II.

THIS CASE CAN BE DECIDED UNDER THE WASHINGTON STATE CONSTITUTION

The Washington Supreme Court has interpreted Article I, Section 7 of the Washington State Constitution as providing greater protection to the individual as to search and seizures than does the Federal Constitution. See State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). In its ruling, the Washington Supreme Court noted that the Fourth Amendment search and seizure language was rejected by the State Constitutional Convention in favor of the current language in the State Constitution. The State Supreme Court noted at 95 Wn.2d 177:

The language of the search and

seizure provision of our state constitution, Const. art. 1, § 7, differs significantly from the fourth amendment to the United States Constitution. The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Const. art. 1, § 7, on the other hand, states:

> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Historical evidence reveals that the framers of the Washington Constitution intended to establish a search and seizure provision that varied from the federal provision. The Constitutional Convention was presented with a proposed state provision identical to the Fourth Amendment, and rejected it in favor of the present Const. art. 1, § 7. See The Journal of the Washington State Constitutional Convention: 1889 497 (B. Rosenow ed. 1962).

> The intentional difference between the state and federal provisions naturally does not permit a reading of the state provision that is more restrictive of defendants' rights than federal law. See Burgett v. Texas, 389 U.S. 109, 114, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967). However, there is precedent for interpreting this particular language in a state constitution as conferring upon a defendant a higher degree of protection than is provided by the federal constitution. Const. art. 1, § 7 differs from the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

Notice, the Washington Supreme Court in deciding the case at bar cited not only federal authority for the constitutional principle involved, but also cited State v. Daugherty, 94 Wn.2d 263, 616 P.2d 649 (1980). Although the Washington Supreme Court in State v. Daugherty, supra, referred to the Federal Constitution, it did cite several state authorities in applying the plain view doctrine.

There is, of course, nothing constitutionally impermissible with the Washington Supreme Court using federal authorities for guidance in interpreting a state constitutional provision, but nonetheless, interpreting its own constitution in a manner which provides the individual with greater protection than the minimum protection afforded under the Federal Constitution. As indicated above, in State v. Simpson, supra, the Washington Supreme Court ruled that the protection against invasions of privacy provided by Article I, Section 7 of the Washington Constitution, is greater than that provided by the Fourth Amendment to the Federal Constitution.

Since this case could be resolved on the basis of the Washington State Constitution, it is respectfully submitted that the United States Supreme

Court should not involve itself in this case. Instead, it should treat the case as having been decided under the Washington State Constitution. See Oregon v. Hass, 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 2115 (1975); Alderman v. United States, 394 U.S. 165, 22 L.Ed.2d 176, 89 S.Ct. 961 (1969). See also Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977).

III.

THE DORMITORY DOOR WAS OPENED AS A RESULT OF A VIOLATION OF CONSTITUTIONAL RIGHTS, THEREFORE, THE EXPECTATION OF PRIVACY WITHIN THE DORMITORY ROOM WAS NEVER VOLUNTARILY SURRENDERED.

The Petitioner recognizes that searches without a warrant are per se unreasonable, absent some well recognized

exception (brief of Petitioner at page 24). The burden is, of course, on Petitioner to show an exception to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

With the foregoing principles in mind, the genesis of analysis in this case is an examination of how or why the door to the dormitory room came to be opened, thus exposing the room to Officer Daugherty's view. Respondent asserts that this opening was secured by unconstitutional means. If the door were opened as a result of a violation of constitutional rights of a co-tenant, the expectation of privacy should be found not to have been surrendered.

In the final analysis, Officer Daugherty wanted to see Mr. Overdahl's identification not so much to prove who

Mr. Overdahl was, as to obtain proof of Mr. Overdahl's age - a key element in the offense for which Mr. Overdahl had been arrested. (J.A., pages 18 and 21). Miranda v. Arizona, supra, teaches us that when an accused has been arrested (there is no question in this case that Mr. Overdahl had been placed under arrest) he must be advised of his rights against self-incrimination and of his right to counsel, prior to obtaining incriminating evidence from him. In this case, Mr. Overdahl's relinquishment of his identification with proof of age would have constituted a testimonial act. Thus, Officer Daugherty had no right to ask the suspect for proof of age without advising him of his rights under Miranda, supra. If Mr. Overdahl was not so advised, his actions in complying with the officer's demand for identification,

i.e., proof of age, were not voluntary. If his actions in opening the door were not voluntary, the privacy insured by the mostly closed door was not voluntarily surrendered.

This Court, in Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), made it quite clear that an individual's reasonable expectation of privacy cannot be invaded by unconstitutional means. Constitutionally speaking, it should not matter whether Officer Daugherty beat Mr. Overdahl into submission, thereby physically forcing him to open the door, or whether Officer Daugherty violated Mr. Overdahl's constitutional rights in a more subtle manner. The violation, either way, is present. See Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968) where consent was

fraudulently obtained from defendant's mother for a search, and the evidence was held inadmissible against the son.

Rawlings v. Kentucky, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980) and United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100 S.Ct. 2547 (1980) stand for the proposition that this Court is primarily interested in protecting a legitimate expectation of privacy in the area which is searched. This expectation of privacy should not in any way be reduced by gaining admittance to the premises or by giving a view of the premises by violating the constitutional rights of a co-tenant. See Bumper v. North Carolina, supra.

It is clear from the record that at the time the door was opened, Respondent had not given up his right to privacy. For that matter, neither had Mr.

Overdahl, since Mr. Overdahl was at the room at the insistence of the police officer. Rawlings, supra, and Salvucci, supra, place the Supreme Court firmly in the corner of protecting the privacy of the individual by permitting that individual to contest the manner or circumstances of police entry into the area of privacy.

The Petitioner's proposition that Mr. Overdahl somehow lessened his expectation of privacy by opening the door should not be accepted. What else could Mr. Overdahl have done when the officer clearly was going to be with him at all times? Further, Officer Daugherty made it plain to Mr. Overdahl that he had no choice but to produce the identification and that the police officer would be with him every step of the way. Mr. Overdahl, in essence, was given no free

choice. (See cases cited at pages 24 through 26, infra.) To say Mr. Overdahl had no expectation of privacy because the police officer had deprived him of it is to assert a nonsequitur.

The case cited by amicus Americans for Effective Law Enforcement for the proposition that a slightly open door carries with it a reduced expectation of privacy (People v. Murray, 134 Cal.Rptr. 481, 64 Cal.App.3d 343 (1976)) should not be relied upon by the Court, since the Murray case was decided on the California "knock and notice" rule, at least with respect to the partly open door. Surely the amicus is not advocating that a police officer can push open a partially open door to get a better view of the unexposed premises. The portion not exposed to view is, it would seem, just as private as if the door were shut.

Officer Daugherty secured his vantage point by an invasion of the privacy of the occupants of the room. The point is, of course, that when Officer Daugherty saw the seeds, he had no right to see them because he had no right to require the opening of the door in the first instance.

Neither can it be said that Mr. Overdahl consented to Officer Daugherty coming with him to the room. In United States v. Viale, 312 F.2d 595 (2d Cir., 1963) cert. den. 373 U.S. 903, 10 L.Ed.2d 199, 83 S.Ct. 1291, one of the defendants walked into a house during a police raid. He was told by one of the officers to go upstairs where he apparently then consented to a search of his person. The Court found no probable cause to arrest him and further found that his consent to the search was involuntary.

In United States v. Como, 340 F.2d 891 (2d Cir., 1965), it was held that a consent to search was coerced. There, the law enforcement officers persisted in efforts to get the suspect to surrender drugs to them before the officers would make a call to verify the suspect's status as a special employee of a law enforcement agency. The Court stated at 340 F.2d at 893:

> The guidelines are clear: "an accused's voluntary consent must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit. Moreover, to be voluntary, a consent must have been unequivocal, specific, and intelligently given." United States v. Smith, 308 F.2d 657, 663 (2 Cir. 1963), cert. den. 372 U.S. 906, 83 S.Ct. 717, 9 L.Ed.2d 716 (1963); see also Channel v. United States, 285 F.2d 217, 219 (9 Cir. 1960).

See also, Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041

(1973) and Bumper v. North Carolina, supra.

In applying Bumper, supra, the Alabama Court of Criminal Appeals found mere submission where a man who had been arrested accompanied police to another house twelve miles away. This submission was found despite the fact the defendant kicked in the door when they arrived at the house. Gass v. State, Ala.Cr.App., 372 So.2d 904 (1979). Similarly, the case at bar shows mere submission to police authority on the part of Mr. Overdahl.

Where a person is under arrest the prosecution bears a particularly heavy burden to show consent was free and voluntary. Smith v. State, Sup.Ct.Ark., 576 S.W.2d 957 (1979). "Arrest causes its own aura of coercion." Gorman v. United States, 380 F.2d 158, 163 (1st Cir., 1967).

The cases cited by Petitioner and amicus Americans for Effective Law Enforcement to the effect that a police officer can accompany an arrested person to his or her room in order for him or her to get clothes, or to fulfill some other purpose are simply not on point as pointed out at page below. Petitioner and amicus seem to be asserting an untenable position. Their logic, apparently, is that Mr. Overdahl, having gone to his room to fulfill his own purposes should expect the police officer to go with him. Mr. Overdahl went to his room, of course, to get an item of evidence which the police officer wanted. How was this fulfilling Mr. Overdahl's own purpose?

Similarly, the other cases cited by amicus Americans for Effective Law Enforcement (Winchell v. State, 362 So.2d

992 (Fla.App. 1978); United States v. Baltazar, 477 F.Supp. 236 (E.D.N.Y. 1979); and Rodriquez v. State, 91 N.M. 700, 580 P.2d 126 (1978)) for the proposition that a police officer in the threshhold of an open doorway can enter, are not apposite, since in none of those cases had the doorway been opened by invading a constitutional right of any of the occupants. Moreover, in each of those cases, although the police officers were in the threshhold, they entered to make the arrest substantially contemporaneously with the search, not specifically to conduct the search. In the case at bar, Officer Daugherty entered to examine evidence (or potential evidence) and for no other purpose, (J.A. 25) except to seize the articles if he found them to be contraband. (J.A. 24).

Further, if Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436 (1948) and Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) are compared side by side, one can easily see that this Court, absent exigent circumstances, will require either a search warrant or an arrest warrant to enter the residence of an accused in order to effect an arrest within the residence, even though a crime is being committed within the presence of the officer.

IV.

OFFICER DAUGHERTY'S ENTRY INTO THE RESIDENCE WAS NOT JUSTIFIED UNDER THE "PLAIN VIEW DOCTRINE".

Since Petitioner acknowledges that the police officer was outside the

residence at the time he saw what he thought might be contraband, it is clear that the plain view exception to the warrant requirement discussed in Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) does not apply. This is because the plain view doctrine requires that the police officer be properly within the protected area or at least be viewing the protected area from a place at which the police officer has a right to be. Petitioner agrees that the police officer was not within the protected area when he saw the seeds and pipe. It then follows that the plain view doctrine does not even come into play.

Please note, however, that if the Court believes that the officer was in fact, or in law, or both, inside the doorway when he saw the potential contra-

band, the Court necessarily must inquire as to whether or not there was a prior justification for the intrusion. See, Coolidge v. New Hampshire, supra. As pointed out above, Officer Daugherty, if he was in the room, was not where he had a right to be.

There is yet another reason why Officer Daugherty was not where he had a right to be, if it is determined that he was, in fact, in the room. As pointed out by the Washington Supreme Court, Officer Daugherty was not concerned about protecting himself from weapons. The record clearly shows that Officer Daugherty could not see Mr. Overdahl's hands (J.A. 22). The record does not reflect that Mr. Overdahl was ever searched up to this point. If the officer had been seriously concerned about weapons, he would have stationed

himself where he could keep the suspect's hands in view at all times.

Washington is not the only state that has held that a police officer does not have the right to accompany an arrested person into his house for every arrest. See, State v. Seiss, 168 N.J. Super. 269, 402 A.2d 972 (1979). In this connection, it is submitted that the police manuals cited by amici American Legal Foundation and Mr. Conley should not be given greater precedential value than the decisions of Appellate Courts of the States.

If the principle that warrantless intrusions should be kept as narrow as possible under the circumstances is accepted, we are left with the proposition that Officer Daugherty should have remained outside the dormitory room while Mr. Overdahl was looking for his wallet,

instead of being just inside the door (if he is deemed to be inside the door), unless the officer could articulate a reason (such as keeping on the lookout for weapons) for being where he could see so far into the room.

Notice, this Court in Shipley v. California, 395 U.S. 818, 23 L.Ed.2d 732, 89 S.Ct. 2053 (1969) stated at 395 U.S. 820:

> [T]he constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search.

Thus, for the reasons advanced above, it is submitted that the police officer, if he is determined to have been inside the room at the time he first viewed what he thought might be contraband, was not where he had a right

to be. The first prong of the plain view doctrine, therefore, is not satisfied.

From the facts of this case, it is quite clear that the police officer inadvertently saw the ashtray and the pipe. Thus, the second prong of the plain view doctrine would probably be satisfied.

Petitioner also has a difficult problem in satisfying the third prong of the plain view doctrine; that is, that the officer had immediate knowledge that he was viewing evidence or contraband. In this connection, it is important to note that Officer Daugherty did not enter the room to seize the item. Neither did he enter the room to effect an arrest. He went into the room to examine the seeds to see if they were marijuana, and for no other purpose. Until he had taken a closer look, he did not know that he

had evidence before him. The law in Washington is that if a police officer must examine an item closer than would be permitted by the naked eye, the police officer does not know that he has evidence before him. See, State v. Keefe, 13 Wn.App. 829, 537 P.2d 795 (1975), where the police entered the premises pursuant to a search warrant to search for a stolen gun. Under these circumstances, the Washington Court of Appeals held that taking exemplars from a typewriter was unlawful. The Court stated at 13 Wn.App. at 833:

> The most that can be said for the officer's view of the typewriter . . . is that an item of possible evidentiary value came within the officer's view.

That is the most that could be said in the case at bar. This is hardly sufficient to justify the entry on the

part of the police officer, or if it be determined that the police officer was already in the room, it is hardly sufficient to justify crossing the room to take a closer look. In this regard, see also State v. Murray, 8 Wn.App. 944, 509 P.2d 1003, cert. den. 421 U.S. 1004 (1973) where the tilting of a television set to record the serial number therefrom was held illegal after consent had been given to search for stolen video and office equipment. The Court of Appeals stated at 8 Wn.App. at 952:

> The officers did not possess the requisite immediate knowledge upon which they could reasonably conclude under the "plain view" doctrine that they had incriminating knowledge before them.

In the case at bar, Officer Daugherty admitted that he entered the room for no other purpose than to examine

the seeds to see if they were marijuana. It seems clear, then, that he did not know whether he had probable cause to make an arrest for possession of the controlled substance until he had examined them more closely. Thus, he could not have recognized immediately that he had seen items of evidentiary value.

This, then, leaves only the so-called "open view" doctrine to the Petitioner to justify the seizure, in the absence of exigent circumstances. The cases cited by Petitioner for the "open view" doctrine (Colorado v. Bannister, 449 U.S. 1, 66 L.Ed.2d 1, 101 S.Ct. 42 (1980) and Harris v. United States, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968)), do not help the Petitioner in its assertion of this "open view" doctrine. As recognized by the

Petitioner, these are automobile cases. It is safe to say that automobiles, because of their mobility, have not been accorded the warrant protection accorded residences. In essence, as will be discussed more fully below, automobiles carry their own exigent circumstances.

Colorado v. Bannister, supra, is a more or less routine automobile search case. The officer had independent probable cause to stop and search the automobile, so he did it. These types of automobile searches have been recognized as valid since Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925).

Harris v. United States, supra, is merely a typical administrative search of an impounded automobile. Neither of these cases would justify the actions Officer Daugherty took in the case at bar.

Having shown that the presence of the police officer at the doorway was not an adjunct to the arrest of Mr. Overdahl, and having further shown that the plain view doctrine does not validate the search, there now remains to be discussed the question of exigent circumstances.

V.

EXIGENT CIRCUMSTANCES WERE NOT PRESENT WHICH JUSTIFIED ENTRY WITHOUT A SEARCH WARRANT.

Petitioner, having acknowledged that Officer Daugherty was outside the room at the time he observed what he thought might be a controlled substance, must justify the warrantless intrusion, if at all, on the basis of the exigent circumstances exception. In discussing

the exigent circumstances doctrine, we will assume arguendo that the police officer had rightfully secured the opening of the door to the dormitory room, since if the door were not validly opened, the exigent circumstances doctrine does not come into play.

It is submitted that a complete answer to Petitioner's theory so far as exigent circumstances are concerned will be found in the teachings of Johnson v. United States, supra; United States v. Chadwick, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977); Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978); Coolidge v. New Hampshire, supra; and Payton v. New York, supra. These cases make it clear that once a protected area is under control of the police so that the status quo can be maintained, a warrant must be obtained

before further searching can be effected. The Petitioner necessarily had to come to grips with these cases to justify the warrantless intrusion and had to draw distinctions between them and the case at bar. Although the Petitioner has strived mightily to draw distinctions, it is respectfully submitted that it has been singularly unsuccessful in this endeavor.

Johnson v. United States, supra, simply stands for the proposition that a police officer can have all of the probable cause in the world to suspect evidence is located within a certain premises, but this probable cause does not excuse the necessity to obtain a search warrant. Indeed, one might well argue that the exigencies in the Johnson case were greater than the exigencies in the case at bar. In Johnson, the agents had no idea how much opium was in the

room. For ought they may have known, the opium would have gone up in smoke by the time the search warrant could be obtained. Nonetheless, this Court ruled that whether or not there was probable cause to enter the room had to be determined by a neutral, detached magistrate, and that the circumstances were not so exigent as to excuse that requirement.

Mincey v. Arizona, supra, is the primary key to this case. This Court, in Mincey, firmly reiterated the proposition that so long as the status quo within the premises can be reasonably expected to be maintained, a search warrant must be obtained. It is respectfully submitted that the prosecution's problem in the Mincey case was not the fact that the police officers searched the premises for four days, as the Petitioner would ask

this Court to believe. Rather, the problem with the search was that the police officers could have secured the premises, thereby assuring the maintenance of the status quo, while a warrant was obtained for further searching. Inferentially, this Court rejected the argument that having once intruded on the privacy of the occupant of the premises, further warrantless intrusions were permissible.

Although the Petitioner cites from Mincey v. Arizona, supra, (Petitioner's Brief, p. 44) it completely overlooks the import of the language. At least to this writer, this Court very clearly told police officers that when they had obtained control of the situation, if they desired to enter the premises, they should get a warrant. What else could the Court have meant when it said at 437 U.S. 394, 57 L.Ed.2d 301:

> There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained.

The Petitioner, in its discussion of Mincey, completely ignores the foregoing language. Let us apply that language to the case at bar. Was there any "indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant."? (437 U.S. at 394, 57 L.Ed.2d at 301). Petitioner has not been able to point to any indication that the seeds and pipe were in any danger during the time it would have taken to obtain a search warrant.

It is interesting to note that Petitioner and all amici protest

vigorously that the evidence would have been destroyed while Officer Daugherty went to obtain a search warrant. Of course, if Officer Daugherty had left the premises without securing them, the seeds very probably would have been destroyed while he was gone. This, however, is not the point. The point is that Officer Daugherty had the means (his walkie-talkie) to be sure that this situation (destruction of evidence) would not have happened. Conveniently, the Petitioner and all amici completely overlook this crucial detail. "Indeed . . . [a] police guard at the . . . [open doorway] minimized that possibility." (437 U.S. at 394, 57 L.Ed.2d at 301). There is no suggestion that the police officer could not have radioed for assistance. As pointed out by the Washington Supreme Court in its

discussion of the case at bar, the police officer actually used his walkie-talkie to call for assistance.

Moreover, in the case at bar, "[T]here is no suggestion that a search warrant could not easily and conveniently have been obtained." (437 U.S. at 394, 57 L.Ed.2d at 301). In light of the fact that Officer Daugherty's walkie-talkie was obviously working, the statement by the Petitioner at page 46 of its brief, that the officer had to do something reasonably calculated to secure the premises during his absence to obtain the warrant, simply is not justified. All he had to do was call for his backup, inform the backup of what the situation was, and either have the backup officer get the warrant, or have the backup officer stand guard at the doorway while Officer Daugherty obtained the warrant. Another

alternative would have been to give the occupants their option as to whether or not they would consent to the search.

Naturally, if the police officer had told them that he thought he saw marijuana and that he wanted their consent or that he would have to obtain a search warrant, if they had then slammed the door in his face, exigent circumstances would clearly have justified the entry into the premises without the search warrant. This assumes of course, that his obtaining the opening of the door was constitutionally permissible in the first instance, and also assumes that he in fact had probable cause to think what he had seen was marijuana.

One looks in vain to find where the circumstances in the case at bar were exigent. There were only two ways

contraband could have been removed pending a search warrant. One was through the door where the police officer was standing. The other was through the window, which was in the officer's view. If the Court finds the circumstances to be exigent under the facts of this case, then in every situation where a police officer sees potential evidence, the circumstances would be exigent. This would negate the requirement of obtaining a search warrant in every case where police officers actually see evidence or potential evidence. This simply is not the teaching of the cases.

> Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search in the house without a warrant.

Agnello v. United States, 269 U.S. 20, 33, 70 L.Ed 145, 149, 46 S.Ct. 4 (1925).

Coolidge v. New Hampshire, supra, also holds that where evidentiary matters are under the control of the police officer, it doesn't hurt anything to get a search warrant prior to intruding into a private domain where the evidence is located. This is also the clear teaching of United States v. Chadwick, supra.

Payton v. New York, supra, is simply one of the latest in a long line of cases which points out the crucial constitutional distinction between an individual's home and, for instance, his automobile. This Court noted at 445 U.S. at 589, 63 L.Ed.2d at 653:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds it roots in clear and specific constitutional terms . . . . In terms that apply equally to seizures

> of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshhold may not reasonably be crossed without a warrant.

To be sure, police officers do not like the warrant requirement. To be blunt, it is a plain nuisance, and, in some respects, an impediment to efficient law enforcement because it takes time. To say the requirement is a nuisance and inefficient, however, is not to say that it must necessarily lead to ineffective law enforcement. There can be little doubt that but for the warrant requirement, many, if not most of us, would have by now been bothered at various stages of the day or night by overzealous police officers off on some wild goose chase looking for evidence - all in the name of good law enforcement.

Moreover, we are accustomed to accepting inefficiencies for the sake of protecting our rights. After all, in the final analysis, the legislative process is rather inefficient. We are informed that a dictatorship is probably much more efficient than our form of government. This kind of efficiency, however, we are unwilling to accept. A jury trial is inefficient. Again, for the protection of the individual, we are willing to pay the price for inefficiency in the fact finding process.

If Officer Daugherty could go back to that night in January, 1978 and was to then simply follow the teachings of Miranda v. Arizona, supra, Johnson v. United States, supra, and Coolidge v. New Hampshire, supra, and United States v. Chadwick, supra, (in fairness to him, Mincey v. Arizona, supra, and Payton v.

New York, supra, had not yet been decided), there should be no constitutional problem with what he would have done, indeed, should have done.

Effective law enforcement could have been easily accomplished by observing the teachings of the above cases, even without Mincey v. Arizona, supra, and Payton v. New York, supra. What if, for instance, Officer Daugherty, when he signaled Mr. Overdahl to come to him, had said, "Young man, I am concerned that you are not 21. I'm afraid that I will have to ask you for some identification to prove your age, but before I do, let me advise you of your constitutional rights."

Now, let us suppose that the police officer advises Mr. Overdahl of his Miranda rights. At that point. Mr. Overdahl could make an informed decision

as to whether or not he wished to cooperate with the police officer. If he elected to cooperate with the police officer, he could have said that he didn't have identification, but that he would go to his room to get it. Whereupon the police officer could say, "Well, since you are under arrest for being a minor in possession, I will have to accompany you to your room. Do you consent to this?" In fact, if Officer Daugherty had not yet advised Overdahl of his Miranda rights, the day probably could have been saved by advising him at this point. Mr. Overdahl could now make an informed determination of whether to go to his room. Under the facts of this case, Mr. Overdahl seems to have been left with the clear impression that he had no choice but to go to his room with the officer. See Respondent's discussion

of this requirement of voluntary consent to search commencing at page 24 above.

When the officer and Mr. Overdahl arrived at the room, and when the officer saw the marijuana seeds, the officer could then have said, "Well, gentlemen, I am concerned that what I see on that dresser is marijuana. I would like to have your consent to enter the room to examine those seeds more closely." Notice that Mr. Overdahl, having already been advised of his Miranda rights, would not have to be re-advised. Since at that point, Mr. Chrisman had not been placed under arrest, and he was in his own residence, he would not have to be advised of his Miranda rights in order to consent to the entry. If the occupants were to withhold their consent, the officer could then say, "Well,

if you do not consent to my entry, I will have to attempt to obtain a search warrant. This will take approximately two hours. Meanwhile, I will have to stay at the door, or if you like, you can stay out of the room, but we must have the room secure while we attempt to obtain a search warrant."[1] Again, the occupants can decide whether or not they want to consent to the search. If the occupants now consent, the officer can enter. If they do not consent, the officer can seek assistance from another officer via his walkie-talkie while a search warrant is obtained.

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[1] In fact, under Michigan v. Summers, ___U.S.___, 69 L.Ed.2d 340, 101 S.Ct.___ (1981), the police officer may even have been permitted to detain the occupants in the room pending the warrant.

What has been harmed by following the simple procedure outlined above? Possibly, if Officer Daughterty had advised Mr. Overdahl of his rights in the lobby, Mr. Overdahl would have elected not to cooperate with the police officer and refuse to go to his room for identification. Surely, it cannot be said that an individual exercising his constitutional rights against self-incrimination is such an impediment to law enforcement that we should make efforts to stop this practice. Let us hope that argument has long since been put to rest. Moreover, it certainly could not be said that offering an occupant of a dwelling an opportunity to consent to a search is an unacceptable impediment to effective law enforcement. If we adopt that argument, we might as well say goodby to the Fourth Amendment.

VI.

A NEUTRAL, DETACHED MAGISTRATE WOULD NOT HAVE ABUSED HIS DISCRETION HAD HE REFUSED A WARRANT IN THE CASE AT BAR.

This case demonstrates the importance of having a detached, neutral magistrate examine the facts and make an independent determination as to whether or not there is probable cause to intrude into the dwelling.

For instance, assume that Officer Daugherty did not enter the room, but instead, elected to recognize the constitutional rights of the occupants by seeking a search warrant. Further, assume that he went to a detached, neutral magistrate and articulated something close to the record made at the suppression hearing. He would have testified that he thought what he saw was

marijuana based on his training and experience, (J.A. 14), the nervousness of Respondent[1], the pipe, the number of seeds, and no plants or birds in the room. (J.A. 14-16). He also would have testified, however, that he was not familiar with the seeds of various vegetables and did not know if they looked like marijuana seeds. (J.A. 25, 31). He would also have acknowledged that Washington State University has a school of agriculture and that the seeds could have been used for experimentation purposes. He would have had to admit that for all he knew, the

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[1] Who, by the way, wouldn't be surprised and nervous at the unexpected sight of a police officer in the doorway of one's residence?

occupants could have been agricultural majors. (J.A. 30). If the magistrate had questioned him as to whether or not he could differentiate between marijuana seeds and beet seeds or onion seeds he would have had to acknowledge that he was not familiar with beet or onion seeds, and that, ergo, any seed is marijuana seed. (J.A. 25, 26).

Under these circumstances, would a neutral, detached magistrate necessarily have found that the officer had probable cause to believe the seeds were marijuana seeds, or was there merely suspicion? A truly neutral, detached magistrate, without abusing his discretion, could have found that the police officer was reasonably suspicious, but that his suspicions did not rise to probable cause.

VII.

THE EVIDENCE SHOULD BE SUPPRESSED BECAUSE OF THE POLICE OFFICER'S VIOLATION OF THE "KNOCK AND ANNOUNCE RULE".

It is not disputed that Officer Daugherty did not announce his intention to enter the room prior to doing so. The "knock and announce rule" requires that before entering a home, the police, absent exigent circumstances, must identify themselves and their purpose. Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963). The mere fact that both of the occupants knew that Officer Daugherty was in the doorway does not excuse Officer Daugherty from announcing his intention to enter the premises prior to doing so. The host of cases on the knock and announce rule are of little help, since each case turns on its own specific facts. The most similar

case to the case at bar the undersigned has been able to find is State v. Slezac, 358 A.2d 605 (R.I. 1976). In the Slezac case, the Court found a violation of the "knock and announce" rule when a police officer opened a screendoor without knocking and without announcing his identity and purpose. Immediately upon entry, he recognized the defendant and the defendant recognized him. After the officer had crossed the threshhold he stated to the defendant, "This is Detective Sullivan. I think you know what we are here for, Steve. We're going to advise you of your constitutional rights. Why don't you have a seat in the kitchen?" The Court ruled that this did not constitute a compliance with the knock and announce rule. Notice, in the Slezac case, it seems fairly clear that the defendant saw the officer before the

officer entered the room and knew him. Nonetheless, the defendant was still entitled to the protection and preservation of his dignity by requiring the policeman to announce his intent to enter prior to doing so. See also, People v. Ouellette, 57 Ill.App.3d 249, 373 N.E.2d 114 (1978). The author of the decision in People v. Ouellette and the author of the article at 70 A.L.R.3d 217 were thinking very much alike. The author of the A.L.R. article, discussing Commonwealth v. DeMichel, 442 Pa. 553, 277 A.2d 159 (1971) at 70 A.L.R.3d 253 used nearly identical language as the Court in People v. Ouellette, supra, to explain one of the purposes of the knock and announce rule - that of protecting the dignity of the individual:

> [T]he court noted that regardless of how great the probable cause to believe a man guilty of a crime, he must be given a reasonable opportunity to surrender his privacy voluntarily and that even where the police duly announced their identity and purpose, forciable entry is still unreasonable and hence violative of the fourth amendment if the occupants sought to be entered and searched are not first given an opportunity to surrender the premises voluntarily.

In the case at bar, how can it be said that the occupants of the dormitory room were given an opportunity to voluntarily surrender the premises when the police officer came in without any announcement? If the knock and announce rule has as one of its bases the protection of the dignity of the individual, which it seems to have, then, absent exigent circumstances, the police officer, prior to entry, should have announced his intention to enter, thereby giving the

occupants (particularly Respondent) an opportunity to voluntarily surrender the premises.

VIII.

THE EXCLUSIONARY RULE SHOULD NOT BE MODIFIED.

It should be noted at the outset that modification of the exclusionary rule has not been sought by the Petitioner in any of the lower Courts that have heard this case. Thus, this Court should not accept Petitioner's invitation to now consider a modification of the exclusionary rule since the question of modification is not properly before the Court. See Supreme Court Rule 34.1. It would unduly lenghten this brief to address each purported

disadvantage to the exclusionary rule raised by amici and Petitioner. The undersigned will be pleased to discuss these matters at oral argument if the Court desires. Respondent shall, however, respond in a general manner to the arguments presented by amici and Petitioner on this issue.

It is submitted that nothing espoused by this Court on the exclusionary rule in the past 65 years has rendered law enforcement less effective, if the law enforcement officers simply play by the rules as propounded by this Court. Naturally, it would be somewhat easier for the police officers to follow the rules if those teaching the law officers would make certain that their pupils have a clear understanding of the mental process which one must go through in order to decide

whether to seek a warrant or whether to enter a protected area without a warrant. The search and seizure cases since Weeks v. United States, 232 U.S. 383, 586 L.Ed. 652, 34 S.Ct. 341 (1914) teach the same fundamental precept: If the status quo can reasonably be expected to be maintained pending a search warrant, a police officer must get a search warrant before invading a citizen's privacy.

It is submitted that the police officer on the street deciding whether or not to get a search warrant, is not so much concerned with whether or not the status quo can be maintained pending the issuance of the warrant, but whether the nuisance of the search warrant procedure can be avoided and still get evidence under the guise of one or more of the warrant exceptions. We all dislike taking a needless step, and what, after

all, could be more needless than having to to through the process of showing a neutral, detached magistrate, that the police officer has probable cause (which he knows he has already) to enter a dwelling or other protected area? Chief Justice Burger answered this question succinctly in United States v. Chadwick, supra, when he said:

> What we do know is the framers were men who focused on the wrongs of that day but who intended the fourth amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.
>
> Moreover, in this area, we do not write on a clean slate. Our fundamental inquiry in considering fourth amendment issues is whether or not a search or seizure is reasonable under all the circumstances. . . . [Citations] The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive

> enterprise of ferreting out crime." . . . [Citation] Once a lawful search has begun, it is also far more likely that it will not exceed proper boun s when it is done pursuant to a judicial authorization, "particularly describing the place to be searched and the persons or things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search and the limits of his power to search. . . . [Citations]

433 U.S. at 9, 53 L.Ed.2d at 546.

The reasons for requiring a search warrant in the case at bar are just as compelling as the reasons for requiring a warrant in United States v. Chadwick, supra, where the police officer had ample means to control the situation pending the issuance of the warrant.

To be sure, the law of search and seizure has its intricacies. There will be cases decided which are inconsistent and cannot be reconciled. This is the

case in nearly every branch of the law. Whenever legal boundaries are set there will be close cases that are hard to decide. Obviously, many of the more difficult ones reach this Court. It is understandable why the Court might give up in dispair over the exclusionary rule. The writer would hope, however, that the Court would keep in mind the hundreds of cases that never get to the Appellate Court level, because the police officer, thanks to the exclusionary rule, got his evidence and still recognized the constitutional rights of the individual.

In discussing all the alleged disadvantages of the exclusionary rule, neither the Petitioner nor any of the amici have even attempted to dispute the fundamental constitutional basis of the exclusionary rule as outlined in Mapp v. Ohio, 367 U.S. 643, 659 L.Ed.2d 1081,

1092, 81 S.Ct. 1684 (1961) as follows:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine, "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. at 21, 150 N.E. at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration - the imperative of judicial integrity." 364 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its existence.

This Court, through the years, has had an excellent opportunity to work with and refine the exclusionary rule. It may not be easy to apply in every case, but neither will any other rule that the Court adopts. While none of us may agree with every decision of the Court in every aspect of search and seizure, its recognition of instances where

warrantless searches are permissible has provided the police officers with clear-cut guidelines in which they can safely and effectively work, if they will only do so. If the Court is now to retreat from the exclusionary rule, and adopt some form of standard of "good faith attempt to comply with the constitution, but falling short of actual compliance" test, it is submitted that the judicial system will be inundated with cases which will have the effect of either (1) further erosion of the Fourth Amendment, or (2) showing the Courts that the police officers are in fact unable to control their actions under a good faith test, since the good faith test can easily become bad faith, through benign neglect. This writer cannot help but believe that if the Court were to abolish or substantially modify the exclusionary

rule, police practices would be such that over the next few years, the Court would have to reinstate the rule.

CONCLUSION

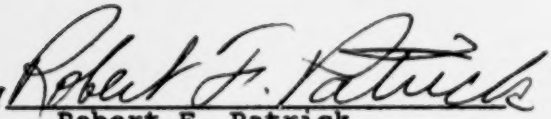
Officer Daugherty's entry into the dormitory room was not proper, since (1) his presence at the door was secured by unconstitutional means; (2) this resulted in an involuntary surrender of privacy by the occupants; (3) the plain view doctrine does not justify the search; and (4) there were no exigent circumstances which justified a warrantless intrusion. The officer's entry into the room was specifically to examine what he thought might be contraband and was not an adjunct of the

arrest of Mr. Overdahl. Therefore, the police officer, when he seized the initial seeds, was not operating within the framework of the Fourth Amendment. His entry into the room was, therefore, per se, unreasonable. Finally, Officer Daugherty's entry into the room was in violation of the knock and announce rule. Thus, all evidence seized as a result of the illegal entry (all of the evidence) should have been suppressed. The Washington Supreme Court should, therefore, be affirmed. Even if the Court determines that the Washington Supreme Court erred in interpreting the Fourth Amendment, the Washington Supreme Court should nonetheless be affirmed on

the basis of its interpretation of the Washington State Constitution.

Respectfully submitted,

AITKEN, SCHAUBLE, PATRICK, NEILL
& CHARAWELL

By 
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Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

PETITIONER,

v.

NEIL MARTIN CHRISMAN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the questions presented as framed by the petitioner present the issues on which this case should be decided?

2. Was this case decided on the Washington State Constitution or was it the intent of the Washington State Supreme Court to do so?

3. Was the dormitory room of the defendant opened as a result of a violation of any constitutional rights of Mr. Overdahl, thereby preventing a voluntary surrender of the expectation of privacy?

4. Was the entry of Officer Daugherty into the dorm room justified under a combination of his "open view" observations and the exigent circumstances that existed?

5. Was it necessary for the officer to strictly comply with the requirements of the "knock and announce rule"?

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CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

See statement as to opinions below set forth at page 1 of Brief of Petitioner.

JURISDICTION

See statement as to jurisdiction set forth at pages 1 and 2 of Brief of Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED IN REVIEW

The Federal Constitutional provision involved in review is the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Washington State Constitutional provision, involved in this case is Article I, Section 7, which states as follows:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

STATEMENT OF THE CASE

See Statement of the Case as set forth at pages 2-14 of Brief of Petitioner.

ARGUMENT

I.
THE QUESTIONS PRESENTED AS FRAMED BY THE PETITIONER ARE THE ISSUES ON WHICH THIS CASE SHOULD BE DECIDED.

At page eight of the respondent's brief, the respondent hereinafter referred to as defendant, asserts that the case at bar was not a situation where Mr. Overdahl was "allowed" to return to his room. The plain fact of the matter is that Mr. Overdahl was the one who suggested that he be allowed to return to his room to obtain

identification. The officer acting in a professional manner advised him that he could return but that the officer would have to accompany him, due to his arrest status. The return to the room was not, as counsel for the defendant suggests, for the purpose of obtaining evidence, but was simply to obtain identification. Mr. Overdahl could not realistically be released prior to some verification of his identity.

Allowing Mr. Overdahl to return to his dorm room was a matter of convenience to allow him to properly identify himself in order to avoid being taken down to the station house and being booked and processed there. If it was the officer's intention to obtain proof of age of Mr. Overdahl as opposed to his real purpose of verifying the identity, he would not have had to go any further than the point at which they were waiting for the elevator to carry them

upstairs since Mr. Overdahl had at that point (prior to their ascent in the elevator) indicated that he was underage.

It is additionally noted that the officer entered the room less than a minute after Mr. Overdahl's entry into the room. The entry was a contemporaneous, if not a simultaneous entry.

II.

THIS CASE WAS NOT DECIDED ON THE WASHINGTON STATE CONSTITUTION NOR WAS IT THE INTENT OF THE WASHINGTON SUPREME COURT TO DO SO.

The defendant at page 13 through 17 of his brief argues that the case could be decided in the defendant's favor under the provisions of the Washington State Constitution. For this proposition the defendant cites State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). However, it appears that State v. Simpson, supra, is limited in its application to the question of whether or not the Washington Constitu-

tion affords more protection as far as "standing" than does the Fourth Amendment to the United States Constitution. The Washington State Supreme Court in State v. Simpson, supra, simply rejected the limitations placed on standing by this court as stated in Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). It is the petitioner's position that the application of State v. Simpson, supra, is in fact limited to the issue of standing. The limitation of the applicability of State v. Simpson, supra, is easily seen when one reviews a prior Washington State Supreme Court decision. In State v. Smith, 88 Wn.2d 127, 133, 559 P.2d 970 (1977), the Washington State Supreme Court, at page 133, stated:

> It is apparent that the fourth amendment to the United States Constitution and article I, section 7 of the Washington State Constitution are comparable and are to be given comparable constitutional interpretation and

> effect. Accordingly, in this opinion, reference will be made only to the Fourth Amendment. [sic]

The Washington State Supreme Court in State v. Christian, 95 Wn.2d 655, 658-659, 628 P.2d 806, 808-809 (1981), in determining whether a warrantless search and seizure was reasonable rendered its decision upon its interpretation of the Fourth Amendment to the United States Constitution. There was no indication by the court that a different result would be dictated by Article I, Section 7 of the Washington State Constitution even though at the trial court level the defendant had argued that the search was unreasonable or in violation of both the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution.

A careful reading of the Washington State Supreme Court's opinion in the case

at bar discloses that the decision rests on the court's interpretation of what the Fourth Amendment to the United States Constitution requires. There was no effort by the court to decide the matter pursuant to the Washington State Constitutional provision; see State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980).

III.

THE DORMITORY ROOM WAS NOT OPENED AS A RESULT OF A VIOLATION OF ANY CONSTITUTIONAL RIGHTS, AND THEREFORE THE EXPECTATION OF PRIVACY WITHIN THE DORMITORY ROOM WAS VOLUNTARILY SURRENDERED.

The defendant makes a rather elaborate argument premised on a supposed violation of the constitutional rights of Mr. Overdahl; see Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). The defendant attempts to misconstrue the officer's request for identification as a request for proof of age. It was Mr.

Overdahl's desire to return to his room for the purpose of expediting his own release. It was not the officer's idea for him to return to the room, nor was it the officer's idea for him to leave the door of the room in such a substantially open position as to expose its interior to the "open view" of the officer standing in the public hallway. The mere fact that the officer acquiesed in Mr. Overdahl's request to return to his room and placed reasonable restrictions on that return does not alter the fact that Mr. Overdahl was allowed, for his own convenience, to return.

There was no intention on the officer's part to obtain incriminating evidence, such as proof of age, as a result of Mr. Overdahl's return to his dorm room. Therefore, there was no violation of Mr. Overdahl's constitutional right to remain silent. Additionally, Officer Daugherty took no

action reasonably likely to elicit an incriminating response from Mr. Overdahl; see Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980); but rather it was Mr. Overdahl who initiated the request and action to return to his room. The officer merely "allowed" Mr. Overdahl to return to his room. Therefore, the expectation of privacy within the dormitory room was voluntarily exposed and consequently surrendered by the actions of Mr. Overdahl.

The defendant conveniently overlooks the fact that Mr. Overdahl had indicated to the officer that he was going to his room for identification with the presumed intention of proving his identity to the officer. The mere fact that the officer insisted that he must accompany Mr. Overdahl to the room because of Mr. Overdahl's arrest status has no constitutional signi-

ficance in regards to the constitutional right to remain silent. The result presumably would have been the same whether or not the officer would have accompanied him to the room or not. Therefore, it is a frivolous argument to say that the production of the identification which was Mr. Overdahl's own idea is somehow an issue of constitutional magnitude.

IV.

OFFICER DAUGHERTY'S ENTRY INTO THE RESIDENCE WAS JUSTIFIED UNDER A COMBINATION OF THE "OPEN VIEW DOCTRINE" AND THE EXIGENT CIRCUMSTANCES THAT EXISTED.

Starting at page 31 of defendant's brief, the defendant questions the right of the officer to protect himself from any potential weapons. What the defendant conveniently overlooks is that the officer had no way of knowing (1) what items were located in the premises he had allowed Mr. Overdahl to return to or (2) anything whatsoever about the other occupant of the

room, Mr. Chrisman, the defendant herein, including but not limited to defendant's mental condition, prior criminal history, etc.

At page 34 of his brief, the defendant infers that the officer, at the time he entered the room, did not have probable cause to believe the substance he had seen in "open view" was in fact contraband. It is clear from the records regardless of defense counsel's assertions in his brief, that the officer at the time believed what he saw was in fact contraband and that he did have probable cause to believe what he saw was contraband. The officer then entered the room and upon observing the contraband more closely determined that it was in fact contraband. The trial court clearly indicated that the seeds in question did not appear to be anything but marijuana (contraband) and noted that they

did not look like any common variety of seeds that the court had ever seen. Clearly, when Officer Daugherty entered the room he believed what he had seen during his "open view" were in fact marijuana seeds. He did not enter the room to "examine the seeds to see if they were marijuana". The officer therefore was entitled to enter the premises based on the totality of the circumstances that existed, the exigent circumstances, and seize the items in question.

The petitioner in its previous brief has essentially discussed why it feels exigent circumstances existed. Suffice it to say that unlike the situation in Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978), Officer Daugherty's actions extended to simply seizing contraband that was already in "open view". There was no desire or intention to do an extensive

search of the premises, although a search was conducted subsequent to the initial seizure. That search, however, was conducted pursuant to a consent to search. For all practical purposes the least intrusive thing Officer Daugherty could have done in the situation was to enter the room and seize the items in open view. Anything he could have practically done to secure the area to make the obtaining of the search warrant effective would have been a greater intrusion under the Fourth Amendment than the simple seizure which could be accomplished quickly and very unobtrusively.

V.

THE EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE POLICE OFFICER DID NOT COMPLY WITH WITH THE "KNOCK AND ANNOUNCE RULE" SINCE TO COMPLY WOULD HAVE BEEN A USELESS GESTURE.

It is submitted for the officer to have knocked and announced in formal com-

pliance with the "knock and announce rule" would have been a futile and useless administrative gesture. His physical presence was clearly known not only to Mr. Overdahl who lead him up to the room, but to the defendant, Mr. Chrisman, after Mr. Overdahl basically fully opened the door of the premises. Clearly, to require the officer to have knocked and announced in this particular situation would have been simply the exercise of a "mere ritual".

It is noted that the Washington Appellate Courts have held that strict compliance with the "knock and announce rule" is not always required; see State v. Haggarty, 20 Wn.App. 335, 579 P.2d 1031 (1978), review denied 91 Wn.2d 1011 (1979).

Although in State v. Coyle, 95 Wn.2d 1, 11, 621 P.2d 1256 (1980), the Washington Supreme Court did not excuse failure to

comply with the "knock and announce" rule it did acknowledge that compliance with the rule may not be necessary in a case where to do so would be a "useless" gesture. This court has indicated that compliance with the knock and announce rule would probably be excused where it was "virtually certain" the occupants were aware of the officer's presence, identity and purpose prior to the officer's entry; see Miller v. United States, 357 U.S. 301, 310, 2 L.Ed.2d 1332, 78 S.Ct. 1190 (1950). Clearly, in the case at bar, the defendant was aware of the officer's presence, identity and as shown by the defendant's responses to the officer's presence prior to entry into the room by the officer, was aware of one of the reasons which caused the officer to enter the room.

In United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir., 1973), cert. denied

416 U.S. 970 (1974), the court, at page 9, discussed the purposes of 18 U.S.C. Sec. 3109, which it referred to as the "rule of announcement" and listed three interests to be served by the rule of announcement ("knock and announce" rule) as follows:

> . . . (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for the individual privacy summarized in the adage that "a man's house is his castle". See Miller v. United States, 1958, 357 U.S. 301, 307, 313 n. 12, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332; Note, Announcement in Police Entries, 80 Yale L.J. 139, 140-41 (1970).
>
> Nonetheless, it has never been suggested that the requirement is an inflexible one; both at common law and in the constitutional context the courts have acknowledged that the interests enumerated above may give way to other considerations. While the limits of these exceptions are by no means clear, they generally stem from the exigencies of law enforcement or involve situations in which compliance with the rule would be mere ritual. See Ker v. California, supra, 374 U.S. at 38-41, 83 S.Ct. 1623 (opinion of Clark, J.); id. at

54-60, 83 S.Ct. 1623 opinion of Brennan, J.); Note, No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970, 55 Minn.L.Rev. 871, 876-86 (1971). In short, 'a claim under 18 U.S.C. Sec. 3109 depends upon the particular circumstances surrounding the [entry].' Jones v. United States, 1960, 362 U.S. 257, 272, 80 S.Ct. 725, 737, 4 L.Ed.2d 697. Judged by these standards, we hold that the entry into the garage did not violate the statute. (emphasis supplied).

Strict application of the "knock and announce" rule in the case at bar would not further any of the three interests enumerated above.

CONCLUSION

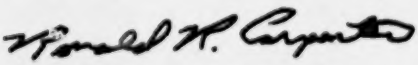
Officer Daugherty's entry into the dorm room was proper, since (1) his presence at the door was not the result of unconstitutional activity on the officer's part; (2) Mr. Overdahl had voluntarily surrendered the privacy of the occupants by leaving the door in the

open posture, thereby exposing the interior of the dorm room; (3) the open view given to the officer allowed him to properly obtain probable cause to believe what he saw was contraband; (4) because of the exigent circumstances which existed, he had authority to enter the premises; and additionally (5) his entry onto the premises was justified to accompany Mr. Overdahl who was in arrest status.

Additionally, since the officer's presence, identity and purpose were apparant to Mr. Overdahl and the defendant prior to the officer's entry into the premises, such entry was not a violation of the "knock and announce" rule. Therefore, the evidence seized as the result of the officer's entry should not have been suppressed. The judgment of the Washington State Supreme Court, insofar as it suppressed the evidence and reversed the conviction

of the defendant, NEIL MARTIN CHRISMAN, the respondent herein, should be reversed; the decision of the trial court and the Washington State Court of Appeals should be affirmed and reinstated.

Respectfully submitted,



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No. 80-1349
IN THE

Supreme Court of the United States

October Term 1980

THE STATE OF WASHINGTON,

Petitioner,

v.

NEIL CHRISMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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QUESTION PRESENTED

This amicus believes that the only question properly presented is whether Respondent's joint tenant voluntarily consented to return to his room with the arresting officer after having been placed under arrest.

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II. THE FACTS AND PETITION HERE DO NOT PROPERLY RAISE ANY QUESTION OF "EXIGENT CIRCUMSTANCES" OR "GOOD FAITH." 8

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington is a statewide, non-partisan organization dedicated to defending the liberties guaranteed by the Bill of Rights. A principal concern of the ACLU-W has always been the security of Washington citizens against invasions of their homes, "the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972).

Out of this concern, the ACLU-W has argued major Fourth Amendment issues here and in the lower courts, and has responded to countless citizen complaints about police actions similar to this one. Our interest here is to answer the sweeping claims of state power made by Petitioner and its supporting amici, and to focus the narrow Fourth Amendment issue we believe this case presents. The parties have consented to our appearance. Rule 36.2.

STATEMENT OF THE CASE

This case arose from a warrantless entry and search of Respondent Neil Chrisman's college dormitory room, which resulted from the arrest of his roommate, James Overdahl, for possession of alcohol.[1] The facts the Supreme Court of Washington held controlling are relatively straightforward. Those facts involve the two critical incidents here: the arresting officer's decision to go to Overdahl's and Chrisman's room, and his actions once there. The testimony on both these points was clear and undisputed.

---

[1] Respondent and Overdahl were jointly charged, and jointly represented in the courts below, until Overdahl's dismissal while the case was pending in the state supreme court. Up to that time, the focus of the case was on the relation between the statements Overdahl made at the time of his arrest, without Miranda warnings, and the search that followed them. See State v. Chrisman, 24 Wn. App. 385, 388-9, 600 P.2d 1316 (1980). Overdahl's removal from the case after briefing was completed (see Washington Rule of Appellate Procedure 13.7 (a)) may have resulted in some confusion in the arguments below.

Officer Daughtery testified that, after he arrested Overdahl (RP 5),

> I then asked the subject for his identification. He stated that he did not have any. He then asked me to hold the bottle while he returned to his dorm room to obtain the proper identification. I stated at that time it was not our policy to subsequently let an individual leave from an area at that particular point without, it just was not the way that we handled the situation....
>
> I stated to him that he could not go alone because we just don't release people from custody....
>
> I stated that he could not go back to his room, and that we could both go up which he stated to me okay. We then entered back into Orton Hall ....

RP 5-6. A witness to this conversation, Lisa Anthony, testified the officer's terms were somewhat more forceful:

> Q. And, when Carl said it was up in his, his identification was up in his room, what did the officer say in response to that?
>
> A. He says where do you live, and Carl told him 1141.
>
> Q. And, then what did the officer say?
>
> A. He said let's go to 1141.

RP 83.

Officer Daugherty testified that, as the two were approaching the room,

> I observed the door to be open approximately 3 to 4 inches. As we got to the room Mr. Overdahl pushed the door open and entered the room. I stood in the doorway without entering, actually physically entering the room.

RP 7. From that vantage point the Officer observed a marijuana pipe and seeds.[2] That observation led the Officer to go farther into the the room, where he placed Respondent under arrest and obtained consent for the more thorough search of the room in which he found the drugs Respondent was convicted of possessing. RP 21-28.

We believe these facts, and these facts alone, control this case. The only issue

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[2] RP 18. The confusion as to whether the Officer was inside or outside the room apparent in Petitioner's Brief (at 5-7) is, as the court below said, a confusion over legal "niceties". State v. Chrisman, 94 Wn.2d 711, 716, 619 P.2d 971 (1980).There was no confusion in the officer's testimony:

> Q. Okay. Were you in the hallway or were you in the doorway?
> A. I was standing against the doorjamb.

RP 9.

presented by the petition here is, as the state supreme court framed it, "whether [the officer] had a right to be" "in the room when he observed the seeds and pipe." State v. Chrisman, supra, 94 Wn.2d at 716. If he did, the search was proper. If he did not, the lower court held the illegality of that observation "tainted" all his subsequent actions (94 Wn.2d at 717-18)--and that holding has not been challenged in this petition. In either case, there is no reason to reach the sweeping and novel Fourth Amendment issues Petitioner and its supporting amici seek to raise here.

I. THE SOLE ISSUE IN THIS CASE IS WHETHER OVERDAHL VALIDLY CONSENTED TO OPEN HIS ROOM TO OFFICER DAUGHERTY'S ENTRY AND VIEW.

Officer Daugherty's "right to be" where he was when he saw the marijuana pipe and seeds from the doorjamb of the room depends we submit, wholly on the legal significance of the conversation with Overdahl which brought him there.

Clearly, Overdahl's arrest alone gave the Officer no power to direct Overdahl to the room he shared with Respondent or to enter or examine that room. Chimel v. California, 395 U.S. 752 (1969); Shipley v. California, 395 U.S. 818 (1969). If the Officer had that power, he could obtain it only through Overdahl's consent.[3] See Giacalone v. Lucas, 445 F.2d 1238, 1247, 1256-8 (6th Cir. 1971); 2 LaFAVE, SEARCH AND SEIZURE 421-2 (1978). If that consent was obtained through "colorable lawful coercion," it was invalid, Bumper v. North Carolina, 391 U.S. 543, 549-50 (1968), and can justify neither the opening of the dorm room door nor the entry into it. See Johnson v. United States, 333 U.S.10 (1948).

---

[3] If the officer's power to enter the room derived from the arrest alone, the issue here would be controlled by Washington law, which more strictly limits the powers of an officer making an arrest for a petty offense than does the federal constitution. See State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1979).

If Overdahl had consented voluntarily to have the Officer go to the room with him, the authority he so conferred would not have ended at the doorjamb where the Officer first stopped.

Although the Washington Supreme Court's decision was not clearly based on this rationale, its reading of the record establishes the absence of voluntary consent. Overdahl went to his room only in response to the Officer's demand for identification, which Overdahl had by then admitted would not prove that he was lawfully in possession of the alcohol. RP 7. Overdahl initially asked to go to his room alone. RP 5. The Officer either suggested (RP 5-6) or demanded (RP 83) to go to the room with him. Overdahl was a young man under arrest (RP 37), and was not advised he had any right to refuse. The totality of circumstances here did not demonstrate voluntary consent. Compare

United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

We submit that is all this Court need decide in this case. Arrest simpliciter cannot justify a residential search; but valid third-party consent can. This case begins and ends with the validity of Overdahl's consent.

II. THE FACTS AND PETITION HERE DO NOT PROPERLY RAISE ANY QUESTION OF "EXIGENT CIRCUMSTANCES" OR "GOOD FAITH."

Petitioner and its supporting amici have gone far beyond the facts and the petition here in their requests that this Court create "exigent circumstances" and "good faith" exceptions to the Fourth Amendment and the exclusionary rule. Neither of these issues is necessarily or properly raised by this case.

The "good faith" argument barely mentioned by Petitioner (Pet. Br. 69), but more strenuously urged by its amici, was

raised neither in the courts below nor the Petition here. This Court has always said the Fourth Amendment's protection cannot turn on "subjective good faith alone." Beck v. Ohio, 379 U.S. 89, 97 (1964). Though that dictum has recently been questioned in a context very different from that here, Williams v. United States, 622 F.2d 830, (5th Cir. 1980), cert. denied, 101 S.Ct. 946 (1981), its continued validity is not properly at issue in this case. Rule 21.1(a), (h).

Petitioner's "exigent circumstances" argument (Pet.Br. 19-52) was made below and is properly raised here, but need not be reached. As we argued above, if Officer Daugherty had the right to have the room opened for his observation, he obtained the right to enter it not from any "exigent circumstances," but from the same source--Overdahl's consent. If the room was opened to him by invalid consent, the

"exigencies" that then arose--solely as a result of his unnecessary demand for incriminating information--cannot change that fact or separately justify his later actions.

CONCLUSION

The decision of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

vs.

NEIL MARTIN CHRISMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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No. 80-1349

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Ronald R. Carpenter, Prosecuting Attorney, Whitman County, Washington, Counsel for Petitioner (hereinafter referred to as "State"), and by Robert Patrick, Esq., counsel for the Respondent (hereinafter referred to as "defendant"). Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

I.

GENERAL INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a citizens group, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws, its purposes are:

> 1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
>
> 2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
>
> 3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime. It also provides legal research assistance in support of responsible law enforcement activities, principally through the *amicus curiae* process in the courts.

AELE has previously appeared as *amicus curiae* thirty-five times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state

courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

II.

SPECIFIC INTEREST OF AMICUS

Our interest arises from the important constitutional and policy questions pertaining to police search and seizure activities in general, and in particular the type of activity involved in the instant case where contraband was inadvertently observed in plain view by a law enforcement officer. It is our belief that it is desirable to fully explore and discuss the legal and policy issues of interest to law enforcement agencies, and that a full airing of the issues will aid the Court in understanding the critically important law enforcement issues in this case and in putting all of them into the broadest possible perspective.

Apart from our desire to give voice to the American public's concern about crime and its consequences, we believe that it is important to express what we think are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search. This position can be assumed by an *amicus,* whereas it may not be available to a litigant.

We stress that our law-abiding citizens and the police have much at stake in this case. A decision for the defendant would be yet another signal to those who have chosen to live outside the law, that they may continue to do so, and in a flagrant manner. The implications of a decision on the legal issues will not be limited merely to college students smoking marijuana; it will apply equally to those who may choose to assemble an arsenal of weapons or explosives and raise the cry of "reasonable expectation of privacy," as if it were a shield to repell inadvertent discovery of their criminal activity by law enforcement officers.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

The facts of this case have been thoroughly presented in the State's Petition for Writ of Certiorari and will not be

repeated at length here. Briefly, college student Overdahl was stopped and detained by campus police officer Daugherty outside of a college dormitory when the officer observed that Overdahl appeared under age and was carrying a bottle of gin. Overdahl had no identification, so he and the officer proceeded to Overdahl's dormitory room to obtain identification. The door to the dormitory room was ajar. Overdahl pushed the door open and entered while Daugherty remained in the doorway. Daugherty noticed student Chrisman, the defendant, in the room and observed that he became nervous upon seeing the officer. Daugherty then noticed marijuana seeds and a pipe in plain view. He approached the contraband, inspected it, and gave both students *Miranda* warnings. He asked if there were other drugs in the room, whereupon defendant produced additional marijuana. The officer radioed for assistance and the responding officer informed the students that there would be a search and the students could either consent to the search or wait for a warrant to be secured. The students conferred with one another and signed written consent forms and were again given *Miranda* warnings. A search yielded more marijuana and LSD.

Prior to trial a suppression hearing was held and the motion was denied. Both students were then tried without a jury and convicted of felony possession of marijuana and felony possession of LSD. The convictions were appealed to the Washington State Court of Appeals, where they were upheld (24 Wash. 385, 600 P. 2d 1316 (1979)). Appeal was taken to the Washington State Supreme Court. During the interim, however, Overdahl's felony probation was dismissed and his conviction record expunged.

On November 26, 1980, the Washington State Supreme Court reversed the defendant's conviction. The State's Writ for Certiorari to this Court was then submitted and granted.

ARGUMENT

I.

CONDUCT BY A UNIVERSITY POLICE OFFICER WHO ENTERED A DORMITORY ROOM WITHOUT A WARRANT AFTER HE ALLOWED AN ARRESTEE TO ENTER THE PREMISES, REMAINED AT THE THRESHOLD OF THE DOORWAY, AND OBSERVED CONTRABAND IN PLAIN VIEW, WAS NOT UNLAWFUL

As is the custom of AELE when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the State in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide.

"It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States,* 390 U. S. 234, 236, 88 S. Ct. 992, 993, 19 L. Ed. 2d 1067 (1968). In such circumstances the seized property does not result from a search.

In the instant case, the pertinent question is whether or not Officer Daugherty was in a position where he had a right to be when he observed the contraband. He was unquestionably in such a position, despite the confusing language in the Washington Supreme Court's written opinion, which states:

> The record is in conflict as to whether Officer Daugherty stood in the doorway and then entered the room or whether, while in the doorway, he was in fact in the room. We need not, however, let the result be determined by such niceties. The police officer was in the room at the time he observed the seeds and pipe. *State* v. *Chrisman,* 94 Wash. 2d 711, 619 P. 2d 971, 974 (1980).

In view of the uncertainty revealed in the Washington Court's opinion, *amicus* will discuss the law applicable to both of the mentioned positions.

A.

OFFICER DAUGHERTY HAD A LAWFUL RIGHT TO BE IN THE HALLWAY OR THRESHOLD OUTSIDE THE DEFENDANT'S DORMITORY ROOM, AND HIS CONDUCT WAS PROPER

At the outset it must be noted that the expectation of privacy differs for residents of single family homes from those of multiple-occupancy dwellings, such as apartment houses, rooming houses, hotels and motels. For example, various state and federal courts have held that it is not a search for police to look through motel room windows from parking lots or other public areas, *Ponce* v. *Craven,* 409 F. 2d 621 (9th Cir. 1969), *State* v. *Brown,* 9 Wash. App. 937, 515 P. 2d 1008 (1973); or for police to listen with the naked ear from outside of rooms or even from adjoining rooms, *Satterfield* v. *State,* 127 Ga. App. 528, 194 S. E. 2d 295 (1972), *United States* v. *Sin Nagh Fong,* 490 F. 2d 527 (9th Cir. 1974), *United States* v. *Fisch,* 474 F. 2d 1071 (9th Cir. 1973).

Similarly, it is consistently held that it is not a search when an officer looks into an apartment while in a common passageway or other common areas of an apartment building. 1 W. LaFave, *Search and Seizure,* § 2.3 at 307 (1978).

Furthermore, *amicus* questions the defendant's subjective expectation of privacy. When Officer Daugherty accompanied the arrestee Overdahl to the dormitory room shared with defendant, the door was not even closed, but rather was slightly ajar and Overdahl pushed it open. On this point, the court in *People* v. *Murray,* 134 Cal. Rptr. 481, 484, 64 Cal. App. 3d 343, 347 (1976) stated:

> [T]he fact is the door at bench was open, even though it was open only a few inches. The fact remains that the door was not closed shut. That fact is significant. It indicates less expectation of privacy by the occupant of the room; less likelihood of surprise upon the entrance of others such as occupants of the house . . .

As already noted, the Supreme Court of Washington determined that Officer Daugherty was inside the defendant's room at the time he observed the contraband. Prior to addressing the propriety of the officer's actions under these circumstances, *amicus* calls to the Court's attention several cases which are factually similar to the instant case, as it is *presented in the record.* We assume that had the Supreme Court of Washington recognized the fact that Officer Daugherty was at the doorway or the threshold of the room it would have held that the officer was in a position where he had a right to be and that his subsequent actions were proper.

The case most similar to the case at bar is *Winchell* v. *State,* 362 So. 2d 992 (Fla. App. 1978), where the District Court of Appeal of Florida, Third District, stated:

> Appellant's co-defendant, Roy A. Falin, was stopped by the police in North Bay Village for the purpose of inquiring as to his presence in the area and to obtain some identification. As a result of this inquiry, Falin was arrested for not having a valid driver's license. Falin, seeking to establish his identity, advised the officer that he was staying with a girl friend (appellant) in room 112 at a Holiday Inn located in North Bay Village . . .
>
> When appellant opened the door the officers saw several bags of marijuana, a scale, a pipe, and a box of sandwich bags in plain view on a dresser in the lighted room before entering it. It was not an illegal search for the officers, who had a lawful right to be where they were, to then enter the room and seize those items. 362 So. 2d 992, 993-994.

This case then provides the proper focus of whether the police were at the doorway for a legitimate purpose; if so, they were in a location or position in which they had a right to be. Certainly the legitimacy of the purpose for which Officer Daugherty was at the defendant's doorway is valid when compared to the purpose of the officers in the *Winchell* case.

A similar case, which involves an apartment complex, is that of *United States* v. *Baltazar,* 477 F. Supp. 236 (E. D. N. Y. 1979), where a police detective went to an apartment to interview an occupant.

> [A]s he stood outside the open door to the apartment he had an unobstructed view of Mr. Baltazar as the latter rose from the couch and retrieved from behind a leather bag on the coffee table a clear plastic bag containing a white powder, which bag Mr. Baltazar then secreted under his coat in the area of his left armpit... The court finds, therefore, that, as he stood in the doorway of the apartment and made the observation recited above, Det. Healy had probable cause to arrest defendant on drug charges. 477 F. 2d 236, 247-248 (1979).

Again, it is clear that the officer was in a position to make observations by virtue of a legitimate, albeit not compelling, purpose. The activities and objects within the room were unobstructed and plainly visible.

In another case, the police were investigating the welfare of an individual who was inside a house. When the defendant voluntarily opened the door at the request of the police, drug paraphernalia came into plain view of the officer. The court stated:

> If an officer is lawfully in a position which exposes contraband or evidence to plain view, the evidence may be seized without benefit of a search warrant. Merely seeing those objects which are in plain view does not constitute a search ... Because the paraphernalia on the coffee table was observed from the threshold of the doorway by the officers in plain view prior to their entry, the evidence was not obtained as a result of a search. *Rodriquez* v. *State,* 91 N. M. 700, 580 P. 2d 126, 129 (1978).

These cases have a number of critical points in common with the case at bar. First, it should be noted that the officers were found to be at doorways or thresholds; and when at those locations for legitimate reasons, each case held that the officers were in positions where they had a lawful right to be. Second, each plain view observation was truly inadvertent. The officers were not investigating the conduct of inhabitants for the purpose of making the arrests which ultimately followed the seizures; nor were they seeking the evidence or contraband which appeared before them in plain view when the doors were opened to them.

B.

OFFICER DAUGHERTY HAD A LAWFUL RIGHT TO BE IN THE DEFENDANT'S DORMITORY ROOM, AND HIS CONDUCT WAS PROPER

Overdahl was a resident of the dormitory room shared with the defendant. Officer Daugherty arrested Overdahl outside the dormitory and when Overdahl was unable to produce an identification, Daugherty accompanied Overdahl to the dormitory room to obtain his identification. The issue then becomes an officer's right to accompany an arrestee during post-arrest movements before booking for the arrest. The most common fact-pattern of post-arrest movement involves an arrest at the arrestee's premises and the need to secure proper clothing before departing the residence. The arrestee may initiate the request for clothing, *United States* v. *Mason,* 523 F. 2d 1122 (D. C. Cir. 1975), *Moffett* v. *State,* 291 Ala. 382, 281 So. 2d 630 (1973), *People* v. *Green,* 14 Ill. App. 3d 972, 304 N. E. 2d 32 (1973); or the *police* may require the arrestee to obtain the appropriate attire, *Giacalone* v. *Lucus,* 445 F. 2d 1238 (6th Cir. 1971), *Walker* v. *United States,* 318 A. 2d 290 (D. C. App. 1974). Such instances often require movement of the arrestee from one room to another, accompanied by the arresting officer. The courts have consistently held that the

inadvertent discovery of evidence in plain view during such movements is admissible. 2 W. LaFave, *Search and Seizure*, § 6.4 at 421 (1978).

Furthermore, cases have held that where the arrestee requests clothing from a closet or drawer, the police are allowed to examine those interior areas. *Walker* v. *United States, supra* and *Giacalone* v. *Lucus, supra.* Other courts have gone further, holding that the police may obtain the clothing, *United States* v. *Mulligan*, 488 F. 2d 732 (9th Cir. 1973). A step beyond this are those cases which hold that an arrestee may be detained in one place on the premises by an officer, while another officer searches for and retrieves the clothing. *United States* v. *Titus*, 445 F. 2d 577 (2nd Cir. 1971) and *Pittman* v. *United States*, 375 A. 2d 16 (D. C. App. 1977).

Commenting on these activities, LaFave states (*supra* p. 421):

> None of these practices seems inherently unreasonable, and thus it is not surprising that they have all been upheld by the courts. Where the police have done no more than accompany the defendant to another part of the premises, resulting in their observation of evidence, it need only be determined that the police were lawfully present where they made the observation. Courts have readily accepted the proposition that to prevent escape and for self-protection it is lawful to so accompany the arrestee... Given the propriety of accompanying the defendant and searching these areas, it has been assumed to be of no legal significance that the police made essentially the same intrusion by undertaking to secure clothing for the defendant.

The dissenting Washington Supreme Court Justice in the instant case has noted two additional cases in his analysis of this point, 94 Wash. 2d 711, 619 P. 2d 971, 976 (1980). In one, *People* v. *Mann*, 61 Misc. 2d 107, 113, 305 N. Y. S. 2d 226 (1969), the court held that it was " 'certainly reasonable' for

police to accompany defendant to a bedroom and 'keep him under continuous surveillance while he was putting on his clothing.' "

In the other case, which goes to the heart of the need to accompany a defendant under such circumstances, *United States* v. *DiStefano,* 555 F. 2d 1094 (2nd Cir. 1977), the court stated that an officer could accompany a defendant from one room to another "to maintain a 'watchful eye' on her and to assure that she did not destroy evidence or procure a weapon."

It is clear that once inside an arrestee's premises it is permissible for an officer to move from one area to another to keep the defendant under observation. On this point, the dissenter in the Supreme Court of Washington aptly states, "If Officer Daugherty had the right to search defendant's room, he obviously had a right to enter it." 94 Wash. 2d 711, 619 P. 2d 971, 976 (1980).

Amicus readily admits that there is a difference between the foregoing cases and the instant one, in that the defendants in those cases were arrested in one area of their premises and the subsequent seizures were at different locations, whereas in the instant case, the arrestee Overdahl was arrested outside of his premises and the seizure was subsequently made within the room. Other cases readily support the propriety of the latter actions, however.

In *State* v. *Sanders,* 374 So. 2d 1186 (La. 1979), the defendant was arrested at his door when officers covertly arranged to buy drugs from him. The officers were outside the door, with the defendant inside and nude. The court reported the facts as these:

> Sanders asked them if he could get his clothes. The officers consented and entered the one-room apartment with Sanders where they seized the marijuana near the door. In the room they saw a hypodermic syringe loaded with reddish liquid lying on the floor. A jar top, a piece of tin foil and a candle were nearby, which they believed

> were used to cook down preludin prior to injection. They also seized this paraphernalia and advised Sanders he would be booked for possession of preludin. 374 So. 2d 1186, 1188 (1979).

On the propriety of the plain view seizure of the preludin, the court stated:

> Once Sanders was arrested for his first offense and placed under arrest he allowed the police to enter his apartment while he donned his clothes. It was then that they saw the preludin in plain view.
>
> Evidence or contraband in plain view which the police discover inadvertently, when they are in a position where they have a right to be, can be seized and introduced in evidence . . .
>
> Insofar as the seizure of the preludin and its paraphernalia is concerned, the officers entered the apartment after arresting Sanders so they could keep him in sight and maintain him in custody. It was their right to protect themselves against the possibility that he might obtain a weapon or that his clothes may contain such. Accordingly, Sanders' clothes were inspected as he dressed. 374 So. 2d 1186, 1188-1189 (1979).

Clearly the facts of *Sanders* are similar to those of the instant case in that the arrest was not made inside the dwelling, the officers entered the premises for the purpose of keeping the arrestee in sight and made a subsequent plain view observation of contraband. Under these circumstances, the Supreme Court of Louisiana did not hesitate to hold that the officers had a right to be in the premises.

We ask the Court to note also that in *Sanders* the officers had information that the defendant was selling drugs from his home, but obtained neither an arrest nor search warrant. This is a significant contrast to the instant case, where Officer Daugherty's plain view observations were truly inadvertent.

Another case, which is properly noted by the dissenting opinion, takes the issue of officers entering premises and making subsequent plain view discoveries to the precise level of the instant case. In *State* v. *Brown*, 132 N. J. Super. 180, 333 A. 2d 264 (1975), the defendant was arrested in his car for possession of cocaine. He requested permission to go to his motel room to obtain a jacket and was accompanied by the police. Upon entering the room, the officers observed a bottle containing a white powder. On the issue of the propriety of the seizure and the officers' right to enter the room, the court stated:

> There is no merit to defendant's contention that the seizure of the Excedrin bottle in his room was unlawful. The police, for their personal safety and to prevent an escape, were justified in escorting defendant to his room to get his jacket when he requested it. The police, therefore, had a right to be in his room, and when they inadvertently saw the Excedrin bottle in plain view they had probable cause to suspect its contents and, therefore, lawfully confiscated it. 132 N. J. Super. 180, 333 A. 2d 264, 266 (1975).

While the foregoing cases address the issue of being on the premises to retrieve clothing, whereas the instant case involves entry onto the premises to secure an identification, *amicus* submits that this is a difference without a distinction. The real issue, as noted in the cases, is the need of the officer to keep an arrestee under observation during post-arrest movements to guard against escape attempts, prevent destruction of evidence, and secure the personal safety of the police in the event the arrestee attempts to obtain and use a weapon.

In the case at bar, *amicus* acknowledges that the opportunity of an escape attempt from the dormitory room was remote, and the possibility of destroying the alcoholic beverage for which Overdahl was arrested was virtually non-existent. However, *amicus* submits that Officer Daugherty had a right to keep Overdahl under his observation for the purpose of securing his own safety. Pursuant to that purpose, the officer had a right to be in the room while Overdahl was locating his identification.

The need for police officers to carry out their duties without unduly jeopardizing their personal safety cannot be overemphasized. There can be no question that officers are frequently injured or killed in situations which initially presented no apparent danger. The need for caution is great in almost all arrests. For example, in 1978, there were more than 56,000 assaults on law enforcement officers. During the ten year period 1969-1978, 1,123 officers were slain in the line of duty. Of the 93 officers killed in 1978, 15 were enforcing traffic laws, eight were investigating suspicious persons or circumstances, and seven were transporting or otherwise engaged in the custody of prisoners.

Furthermore, according to the FBI Uniform Crime Reports,

> Ninety-one (98 per cent) of the law enforcement officers killed in 1978 were slain with firearms. Handguns were used in 67 of these deaths, rifles in 13, and shotguns were used to kill 11 of the officers. Fourteen officers were slain with their own firearms. Of the 2 officers not slain with firearms, 1 was killed with a blunt instrument and 1 with personal weapons (hands, fists, feet) ... It cannot be stated that any one day of the week is more hazardous to a law enforcement officer than any other. However, more officers are slain during the nighttime hours, especially between 9:00 p.m. and 3:00 a.m. From 1969-1978, 43 per cent (484) of the 1,123 officers who lost their lives in the line of duty were killed during the aforementioned 6-hour period. 1978 FBI Uniform Crime Reports, *Crime in the United States,* U. S. Department of Justice (1979).

Clearly, from the police officer's perspective and experience, tragedy can strike under the most routine circumstances. As an officer strives to serve and protect the public, he must also be protective of his personal safety and take those steps which serve to minimize the ever-present danger. Applying these principles to the case at bar, Officer Daugherty accompanied Overdahl to his dormitory room after Overdahl had been arrested. Admittedly, the arrest was for a minor

infraction and not in itself cause for the officer to be unduly concerned. But once reaching the room, the officer encountered the defendant, Overdahl's roommate. Daugherty knew nothing of the character of the defendant, only that he was visibly nervous upon seeing the officer at the doorway. In retrospect, we know that the defendant was agitated because of the possibility of discovery of drugs in the room. But Daugherty did not know that until he viewed the seeds and pipe. He had no reason to know why the defendant was agitated, but he did know that such a reaction was good reason to be on guard. Continual observation of the occupants of the room, under these circumstances, was highly appropriate to insure the officer's own safety. Under this rationale, Officer Daugherty had a right to be in the dormitory room, observing the movements of Overdahl and defendant.

C.

EXIGENT CIRCUMSTANCES EXISTED TO SEIZE CONTRABAND OBSERVED BY A POLICE OFFICER IN PLAIN VIEW IN A DORMITORY ROOM, WHEN THE OFFICER WAS ACCOMPANYING AN OCCUPANT PLACED UNDER ARREST

Amicus respectfully submits that Officer Daugherty's conduct in seizing the marijuana seeds which were in plain view was proper and that exigent circumstances prevented the procurement of a search warrant. It is well established that exigent circumstances exist if contraband is threatened with removal or destruction. *Johnson* v. *United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948). Furthermore, the determination of whether the exigencies of a situation are sufficient to allow a warrantless search depends upon the totality of the circumstances. *United States* v. *Evans,* 481 F. 2d 990, 993 (9th Cir. 1973).

It takes little or no imagination to picture the scenario of rapid events if Officer Daugherty had left the dormitory room to secure a search warrant for drugs after his inadvertent plain view observation. It would have followed closely the script pictured by a trial court and quoted in *State* v. *Mollberg,* 246 N. W. 2d 463, 469 (Minn. 1976):

> It does not take much imagination to predict that had the officers picked up the evidence in plain sight and then returned to get a search warrant for further marijuana, or other controlled substances or paraphernalia, they would not have found much upon their return to the premises in question.

II.

ASSUMING, ARGUENDO, THAT THE CONDUCT OF THE OFFICER WAS THE RESULT OF AN IMPROPER SEARCH, IT WAS CONDUCTED IN A REASONABLE, GOOD-FAITH BELIEF THAT IT WAS PROPER, AND THE CONTRABAND SHOULD NOT BE EXCLUDED AS EVIDENCE

The exclusionary rule does not prevail in all aspects of criminal procedure. For example, it does not extend to grand jury proceedings, *United States* v. *Calandra,* 414 U. S. 338, 347, 94 S. Ct. 613, 619, 38 L. Ed. 2d 561 (1974), nor does the rule require exclusion of evidence for impeachment purposes, *Walder* v. *United States,* 347 U. S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). The rationale for such decisions has been to strike a balance between a defendant's rights under the Fourth Amendment and the public's interest "in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States,* 394 U. S. 165, 174-175, 89 S. Ct. 961, 967, 22 L. Ed. 2d 176 (1969).

More recently the concept that a police officer's good-faith belief that his conduct was proper has been held to bar the application of the exclusionary rule to the evidence.

In *United States* v. *Williams*, 622 F. 2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981), the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7 (5th Cir. 1980)

This exception to the exclusionary rule is not broad-based, but rather strictly limited. The *Williams* Court noted that the officer's subjective belief concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure would obviously not constitute good faith. The police officer's actions must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d 830, 847.

The *Williams* Court addressed the by now widely recognized gross inability of the rule to effectively serve its initial purpose of deterring police misconduct in certain limited situations when it stated, "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d 830, 842. The court further eloquently articulated the need to apply the rule only when that application can serve its originally intended purpose, when it stated:

> For here the cost of applying the rule is one paid in coin minted from the very core of our fact finding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth, censured if they do. This is a high price indeed and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had. Such a continued wooden

> application of the rule beyond its proper ambit to situations that its purposes cannot serve bids fair to destroy the rule entirely in the long run. 622 F. 2d 830, 847.

Prior to the *Williams* decision, this Court recognized that the deterrent effect of police misconduct intended by the rule is significantly diminished when the officer acts under a valid good-faith belief that his actions are proper. In *Michigan* v. *Tucker,* 417 U. S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974), the Court stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a great degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

In a concurring opinion in *Brown* v. *Illinois,* 422 U. S. 590, 612, 95 S. Ct. 2254, 2266, 45 L. Ed. 2d 416 (1975), Mr. Justice Powell commented on *Michigan* v. *Tucker,* thusly: "In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence."

Since the Fifth Circuit Court of Appeal's opinion in *Williams,* state courts are rapidly beginning to look beyond alleged police misconduct to determine whether such misconduct was flagrant and purposeful, in which case the rule would apply as it was intended; or whether the misconduct was carried out under a genuine objective good-faith belief that the officer's conduct was consistent with lawful enforcement procedures, in which case the evidence would properly be admitted to assist in the determination of the guilt or innocence of the accused.

People v. *Pierce*, 88 Ill. App. 3d 1095, 44 Ill. Dec. 326, 411 N. E. 2d 295, 301 (1980), is one such state case. There the court stated, "... the purpose and flagrancy of the police misconduct is premier in any analysis, ..." The court then considered the totality of circumstances, found that the police intrusion was minimal and not conscious or flagrant, and held that the "reasonable and good-faith belief" exception to the exclusionary rule fashioned by the *Williams* Court would apply.

The most recent state to adopt the good-faith exception is New York, where, in *People* v. *Adams*, ___ N. Y. 2d ___, ___ N. E. 2d ___, 29 Cr L 2173 (1981), the New York Court of Appeals applied the good-faith exception to a consent to search situation where the consenting party was not a lawful resident of the premises searched by the police.

On the applicability of the rule to this specific situation, the New York Court of Appeals stated:

> A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule ... Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police, believing that they are acting lawfully, engage in a search which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous. *Adams*, ___ N. Y. 2d ___, ___ N. E. 2d ___, 29 Cr L at 2173.

The court also considered the environment in which law enforcement officers perform their duties when it stated:

> Detached from the tension and drama of the moment, it is sometimes easy for an appellate court to lose sight of the fact that it is the reasonableness of police action which is the linchpin to analysis of any case arising under the Fourth Amendment. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act (*Brinegar* v. *U. S.*, 388 U. S. 160, 197)," the police conduct of securing the rifle and ammunition in the

> defendant's closet was a reasonable response to the situation in which they found themselves and, therefore, was not proscribed by the exclusionary rule. *Adams,* ____ N. Y. 2d ____, ____ N. E. 2d ____, 29 CrL at 2174.

Even the state legislatures are likely to adopt this theme of looking at police conduct in the search and seizure area according to its reasonableness, focusing on the good faith of police officers. Recently the State of Colorado became the first state to adopt a good faith exception to the exclusionary rule by statute (Colo. Rev. Stat. 16-3-308, signed by Governor Dick Lamm on June 5, 1981 and taking effect July 1, 1981). The legislation was sponsored by 33 representatives and 7 senators in the Colorado legislature, and according to its draftsman, Denver District Attorney Dale Tooley, speedy judicial review of the new statutory exception to the exclusionary rule will be sought. It can certainly be expected that other states will follow the Colorado example.

While the cases noted above are not factually similar to the case at bar, *amicus* submits that the rationale of those holdings is directly applicable. There can be no assertion that Officer Daugherty acted with malice. Any intrusion he made into the defendant's room was for a legitimate purpose and done in the least possible obtrusive manner. The defendant's expectation of privacy was obviously not great when contraband was allowed to sit in plain view and the door to his room was not closed shut. But of paramount concern to *amicus* is the present uncertainty of the law under such circumstances. Did the officer have a right to keep an arrestee under continuous observation during necessary post-arrest movements? Even if Officer Daugherty had been an attorney, even if he had been a legal scholar of the Fourth Amendment, he could not have made a better decision; simply because there is no clear indication in the cases on these precise issues.

Assuming, arguendo, that Officer Daugherty's actions resulted in technical error of the most strained and refined sort, *amicus* respectfully submits that he acted with an objective, reasonable and good-faith belief that his actions were proper under the circumstances; and as a result of these actions, there is no sound basis for exclusion of the evidence. To apply the exclusionary rule in such a case would serve no deterrent purpose, but rather only to detract from a determination of guilt or innocence of the defendant. It would further place beyond the pale the elusive search for truth that has all but deserted our trial courts through the years that they have been burdened with this unfortunate, ill-conceived judge-made rule. The time to bring this chaotic chapter in our jurisprudence to a charitable close is here.

CONCLUSION

Amicus respectfully submits that the decision of the Supreme Court of the State of Washington should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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NO. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF WASHINGTON, PETITIONER
V.
NEIL CHRISMAN, RESPONDENT

on writ of certiorari to the Supreme Court of the State of Washington

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BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA AND J.W. CONLEY, INSTRUCTOR, HOUSTON POLICE ACADEMY, HOUSTON POLICE DEPARTMENT

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CONSENT OF PARTIES

All parties have consented to the filing of this brief of amici curiae. Letters of consent have been, or are being, lodged with the Court as of the time of filing hereof.

INTEREST OF AMICI CURIAE

The Legal Foundation of America ("LFA") is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The law of search and seizure has reached a point at which it detracts seriously from the ability of the criminal justice system properly to perform its most important functions. LFA has previously appeared as amicus curiae in this Court to urge this view in Mi-

chigan v. Summers, —— U.S. —— (1981), decided earlier this term. LFA believes that the decision below in the instant case is a misapplication of the fourth amendment that would harm the criminal justice system, impacting adversely upon both the control of crime and the interests of arrested persons. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Officer J.W. Conley is a Houston Police Officer of ten years' experience and is Instructor at the Houston Police Academy. His duties include the teaching of subjects relevant to the case at bar, including proper procedures for the making of arrests. The opinion of the Washington Supreme Court in this case would, if followed, make the coherent training of new officers in this important subject more difficult for Officer Conley and others like him throughout the country. The Washington Court disapproved, as "illegal," Officer Daugherty's explanation that he accompanied his arrestee in this case because "we just don't release people from custody." But Officer Conley believes Officer Daugherty's statement was correct. All police training books, including those used by Officer Conley, teach emphatically that without exception, an arrested person should never be allowed to leave the officer's presence, for the safety of the officer, the arrestee, and others. This is a sensible procedure, and Officer Conley wishes to continue teaching it. On the other hand, there are many occasions in which reasonable requests from an arrested person might prompt an officer to allow him to go briefly to his residence or to some other place. Officer Conley wishes to conduct police training that would enable officers to act humanely and courteously in such situations. The opinion of the Washington Supreme Court creates an insoluble dilemma: it would prevent Officer Conley, and others like him across the nation, from teaching new officers to respect the dignity of the persons they take into custody in such situations, while at the same time following procedures fundamentally necessary to the making of safe arrests.

STATEMENT OF THE CASE

Officer Daugherty of the Washington State University Police Department, while making an investigation of an unrelated incident at one of the University's dormitories, happened to view a person he believed to be a minor in possession of alcohol in violation of State law. This individual, Carl Overdahl, was carrying a bottle of gin outside the dormitory. Officer Daugherty asked Overdahl to show him his identification. Overdahl replied that it was up in his room on the eleventh floor, and he asked Daugherty for permission to obtain it. Rather than permit Overdahl to disappear into the labyrinth of the dormitory, Daugherty accompanied him to the eleventh floor. At no time did Overdahl give any indication that he was displeased with this accompaniment, and at no time did he vary from his stated intention of retrieving his identification from his room. It is conceded by all parties that Overdahl was under arrest for being a minor in possession of alcohol at the time and that the obtaining of the identification was at his request.

When Overdahl reached his room, he found the door ajar, opened it further, left it open, and went in with the ostensible purpose of finding his identification. The record indicates at several points that Officer Daugherty was in the hallway at this time. The Washington Supreme Court characterized his location as either at the threshold or slightly inside the room; the record supports the conclusion that he was outside at the relevant time. Officer Daugherty observed marijuana seeds and a marijuana pipe in plain view on the table next to which Overdahl's roommate, Neil Chrisman, the respondent in this case, was sitting. Upon seeing Officer Daugherty, Chrisman became visibly nervous. He looked away, then looked back. He got up and approached a cabinet, then withdrew his hand. He placed a metallic box on a desk and moved away. Overdahl was apparently looking in a drawer, ostensibly for his identification, during this time. Upon seeing the marijuana seeds, Daugherty entered the room, examined them, and advised both defendants of their Miranda rights. He asked whether they had other drugs in the room. After a brief discussion, during which both individuals indicated they understood their rights and were waiving them, Chrisman handed the

officer a box containing three small bags of marijuana. Daugherty radioed for assistance; Officer Kenny responded. Further warnings, private conference between Overdahl and Chrisman, and the signing of a consent-to-search form followed, and the search revealed more marijuana as well as LSD.

From these circumstances, the Washington Supreme Court ultimately concluded that Officer Daugherty had conducted an "unlawful search" of Overdahl and Chrisman's room by accompanying Overdahl to the threshold and viewing the marijuana. This "search" was accomplished not by Officer Daugherty's ransacking of dresser drawers; it was accomplished by his eyes and by the "intrusion" of his standing at the threshold. It was apparently the Washington court's position that Officer Daugherty should have either released Overdahl scot free after arresting him or denied him the opportunity to obtain identification.

SUMMARY OF ARGUMENT

Amici curiae will not attempt to duplicate here the detailed case analysis undertaken by the State of Washington and by Amicus Curiae Americans for Effective Law Enforcement. Instead, these amici will attempt to explain the inconsistency between the Washington Supreme Court's opinion and reasonable police procedure upon arrest.

I.

The Washington Supreme Court's holding is contrary to one of the most reasonable and basic rules of arrest procedure: namely, that an officer should never permit an arrested person to leave his sight. Arrest may precipitate unpredictable behavior even in ostensibly harmless individuals, and police training properly teaches that every arrest is therefore a serious matter that should be conducted so as to ensure safety.

II.

Because officers would run an unacceptable risk in permitting arrested persons to leave their custody, the Washington court's

decision will induce officers to refuse even reasonable requests of arrested persons to return briefly to their residences. It would so discourage field investigation of claims of innocence. The Washington court's opinion thus forces officers to act inhumanely and would subject them to increased community hostility.

III.

Professionalism means following basic procedures. A police officer should be able to follow the same basic procedures with all arrested persons as a professional assurance of safety. In addition, the interest in treating all people equally dictates that the same procedure be employed to arrest upper-middle-class college students as is used in arresting unemployed ghetto youth.

IV.

This case is controlled by cases construing the plain view doctrine and not, as the Washington Supreme Court erroneously concluded, by Chimel v. California. Chimel applies when the officer is conducting an intentional search incident to arrest, not when he happens by chance to view contraband.

V.

This Court should recognize a reasonable, good-faith mistake exception to the exclusionary rule. The disrespect that construction of search and seizure laws has created for the courts costs the criminal justice system dearly, and the refusal to recognize a reasonable, good-faith mistake exception adds nothing to the accomplishment of the exclusionary rule's purposes. The result reached in this case by the sincere efforts of the Washington court to apply search and seizure doctrine in a rational manner is an indication of the urgent need for a fundamental restructuring of this confused and counterproductive area of the law.

ARGUMENT AND AUTHORITIES

I. THE WASHINGTON SUPREME COURT'S DECISION AMOUNTS TO A HOLDING THAT

UNIVERSALLY ACCEPTED ARREST PROCEDURES ARE "UNREASONABLE" AND "ILLEGAL."

In its opinion, the Washington Supreme Court suggests that a police officer has no valid reason to maintain custody of an arrested person when that person has been permitted to return briefly to his residence, unless the officer has concrete advance evidence that the arrestee will escape, destroy evidence, or assault the officer. State v. Chrisman, 619 P.2d 971, 974 (1980). Such a suggestion, if followed, would needlessly jeopardize the lives of officers, arrested persons and others. Academicians in both criminal law and police science observe that arrested persons are often prompted to engage in inappropriate behavior by the fact of arrest itself, and that consequently even ostensibly harmless individuals may prove dangerous to themselves or to an arresting officer.

A. Police Science teaches that arrest may precipitate unpredictable behavior even in ostensibly harmless individuals, and that every arrest should therefore be taken seriously and be conducted safely.

The American Bar Association, for example, has published the following:

> Most persons stopped for interrogation do not constitute any threat to the safety of the interrogating officer. This is true even though they may be guilty of some offense. But recognizing that most persons interrogated are harmless only emphasizes the fact that some are not. Officers are sometimes attacked . . . . *In addition, there is no way officers can identify in advance which suspects are likely to be dangerous.*
>
> *The officer's lack of ability to predict reliably whether a particular suspect is armed and dangerous, combined with the high degree of danger to him if he makes a wrong guess,* results in the officer's feeling that he must constant-

ly be on guard. (emphasis added)

Tiffany, *Police Action Taken for Self-Protection, in* AMERICAN BAR FOUNDATION, DETECTION OF CRIME 44-45 (1967). This work recognizes, as the Washington Supreme Court did not, that an officer meets hundreds or thousands of unpredictable arrestees in a career, and yet he cannot afford to underestimate even one.

Police training manuals bear out this common-sense notion by suggesting certain fundamentals. "The first, and foremost, of these fundamentals is that arresting people is serious business." R. CLIFT, A GUIDE TO MODERN POLICE THINKING 186-87, 192 (3d ed. 1970). Clift points out that detention of a person to ask him questions is one thing, but arrest is quite another: "if you detain him in order that he may answer for an offense, and he knows that he is being taken in for this reason, you have an arrest on your hands . . . ." The reaction of the detained person may, without warning, change to one of instinctive desperate resistance, or it may manifest itself in elaborate subterfuge designed to take the officer by surprise. *See also, e.g.*, G. SYLVAN, DEFENSE AND CONTROL TACTICS 70 (1971)(part of a law enforcement series by Prentice Hall, stating: *"Never underestimate a suspect.* . . . [Y]ou will come into contact with a great variety of people under many different circumstances. . . . Remember, you are not a mind reader. You have no way of telling what the suspect may be thinking")(emphasis in original); E. WILLIAMS, MODERN LAW ENFORCEMENT AND POLICE SCIENCE 199 (1967)(*"It is impossible to predetermine a person's reaction to police restraint"*)(emphasis added).

The majority of police fatalities occur during "routine" activities such as patrol, particularly when an officer, as here, encounters circumstances that seem innocuous but are suspicious enough to require action or investigation. R. ADAMS, T. MCTERNAN & C. REMSBERG, STREET SURVIVAL: TACTICS FOR ARMED ENCOUNTERS 26 (1980). A disproportionate number (12 percent) occur during "routine" traffic stops. Likewise, a large percentage occurs during arrests for other than common major crimes (21 percent). Nineteen percent occur during

disturbance calls and 8 percent during "investigations of suspicious persons or circumstances." Id. at 25. The assumption of the Washington Supreme Court, that an officer would have advance warning of situations in which arrests might be dangerous and could safely wait for concrete "evidence" that vigilance was justified in the particular situation, was simply unwarranted.

It is not only harm to the officer that is of concern. Underestimating an arrested person may endanger the arrestee or others. "Sometimes the arrested person will take his own life." R. CLIFT, supra, at 187. Clift makes clear that this reaction does not follow logical patterns, and it occurs with respect to persons arrested for relatively minor offenses. It "is especially apt to happen with older people, [or] with the type of criminal who has carried on . . . without the knowledge of his social class. . . . Embezzlers *and drug users.*" Id. (emphasis added). For example, Houston Police Officer John Bales had the experience of arresting a woman for the relatively minor offense of failing to give information after a traffic accident and of allowing her, alone, to use the bathroom in her home. After a lengthy wait, Officer Bales broke down the bathroom door and found the room filled with gas from a bathroom stove the suspect had opened in an effort to take her own life. Interview of Assistant Chief John Bales, Houston Police Department, by Susan Waite, in Houston, July 27, 1981. The point is not that such an occurrence was likely here; rather, it is that it is never perceptibly "likely" that an arrested person will engage in dangerous behavior, but such behavior is utterly unpredictable. Preservation of the safety of officer and arrestee alike requires that an officer remain vigilant during *every* arrest, not just during some of them.

B. Police training emphasizes, as a universal and unvarying rule, that an officer should never allow an arrested person to leave his presence. This approach is proper and reasonable.

Because arrested persons' reactions cannot safely be predicted, the only reasonable approach is for arresting officers to be

continuously observant of their actions. Thus police training books emphasize that, without exception, the arresting officer should never allow an arrested person to leave his presence. Most of the manuals stress the rule as fundamental. Many use italics or other means of emphasis to ensure that it is understood. Amici curiae have found no manuals or books that depart from this advice. Officer Daugherty's testimony that "we just don't release people from custody" was the remark of a professional, trained peace officer.

For example, the Houston Police Department uses two books to instruct new officers concerning protection of safety. One is R. ADAMS, T. MCTERNAN & C. REMSBERG, supra. This training book is widely used throughout the United States, to teach state, local and federal officers, and covers not only the use of firearms but the prevention of the need to use force in common situations, including arrests. It contains the following:

> Suspects may try to . . . [make] you look foolish or [play] on your sympathies. But *under no circumstances should you permit a suspect to move out of your immediate presence,* even if denying him a request seems harsh. A city marshal in Kansas had arrested and handcuffed a parole violator . . . . As he was being put into the patrol car, the suspect asked and was granted permission to return to his own vehicle for a moment to speak to his bewildered children alone. There he obtained a .357 cal. handgun, which he managed to fire twice at the marshal's chest even though his hands were cuffed behind him. As the marshal lay dying, the assailant stole his service revolver and fled, with [one of the children] driving the car. (emphasis in original)

Id. at 266. This rule, that an arrested person should never be permitted out of sight, is so fundamental that it is repeated throughout the book at various points. E.g., Id. at 75 (stressing that apparently "harmless" persons may act unpredictably upon detention for arrest). The Houston Police Academy also assigns, as recommended reading, P. BROOKS, OFFICER DOWN: CODE THREE (1975), which contains the same point. Id. at 136.

The same advice appears in other police training manuals. For example,

> In police files there are *hundreds of cases where policemen lost their lives simply because they allowed their prisoner to go into the bedroom to get his coat prior to going to the station, or to go to the bathroom, or to get a drink of water, lock his automobile, or any one of a number of last minute chores.* In each case, the prisoner returned with a weapon and killed the officer. (emphasis added)

R. CLIFT, supra, at 192. Clift's reasoning is directly applicable to the case at bar. Another text contains the following:

> . . . *Always keep your suspect within your sight* and maintain good control over him by giving him clear, firm verbal commands. (emphasis added)

G. SYLVAN, supra, at 70. The American Bar Association's own publications indicate how common this "keep within sight" advice is:

> The most frequently encountered police self-protection practice is ordering a suspect to keep his hands in sight.

Tiffany, supra, at 49. Tiffany points out that this is a relatively mild order and is preferable to many other means of police self-protection, including, for instance, the "frisk." Id. at 50-51. It should be pointed out that many training books recommmend not only continual visual observation, but that every arrested person be handcuffed, without regard to the offense or the person. E.g., R. CLIFT, supra, at 191-92.

Examples of harm done to police officers who failed to follow these admonitions are unfortunately numerous. An all-too-familiar story is that in which an officer attempts to break up a family disturbance, especially when alcohol is involved. In one such incident that is given as an example in a police training book, the officer told the husband to "go get your shoes and shirt on. You're going to jail." Without a word, the husband went into the bedroom, returned with a rifle, and shot and killed the officer, his wife, and himself. P. BROOKS, supra, at 136. This same scenario was repeated on September 19, 1977, when Officer David Huerta of the Houston Police Department used a suspect's tele-

phone to report his location and was killed by the suspect, who obtained a shotgun from the bedroom, where the officer had allowed him to go unattended. Interview with Assistant Chief John Bales, Houston Police Department, by Susan Waite, in Houston, July 27, 1981. In both of these situations, the murder of the police officer was preceded by no warning. Niether officer was possessed of objective "evidence" about what was to happen. Therefore, the Washington Supreme Court would hold that the simple, reasonable procedure that would have saved each officer's life (as well as that of the husband and wife in the first case) was "illegal."

In the case at bar, Daugherty knew little about Overdahl. He knew that Overdahl claimed to be nineteen years of age and was under arrest. He knew that Overdahl was in his room, looking about. As to Chrisman, he knew he was nervous, was acting erratically and was moving his hands suspiciously about objects in the room. He also knew, when he saw the marijuana seeds, that Chrisman was committing an offense. For the officer simply to assume that he could discontinue viewing his arrestee under these circumstances would have been inappropriate.

The Washington Supreme Court considered that Officer Daugherty had no reason to do what he did. 619 P.2d at 971. This conclusion was erroneous. Officer Daugherty was following universally accepted procedure for dealing with a dangerous and unpredictable situation. The potential danger of his arrest would have been enhanced by treating it as "routine," even though it was for a minor offense. The only way that acceptable levels of safety can be attained in this serious business is to follow basic rules designed to ensure safety, without exceptions. That is what Officer Daugherty was doing. Indeed, if Officer Daugherty had consciously and wilfully neglected his duty in the manner suggested by the Washington Supreme Court, he would have been subject to discipline in many police departments.

Of course, the prevalence of a practice for the safety of officers and arrestees, and its universal inclusion in training manuals as an unvarying rule, does not indicate that it should overcome the considered judgment of a court. If a police-manual

practice is unconstitutional, its uniform inclusion in books of the genre would not save it. However, the fourth amendment is intended to prohibit "unreasonable" conduct in connection with searches and arrests. The universal emphasis of this practice as a fundamental arrest procedure in both police training books and publications of the American Bar Association, together with the giving of a reason for it in the form of the unpredictability of arrestees' reactions, indicates that it is not unreasonable.

C. A police officer does not have authority to grant personal-recognizance bail, even temporarily and even to a person he believes will reappear.

The suggestion of the Washington Supreme Court that Officer Daugherty had no reason to accompany the arrestee here amounts to a recommendation that he should have released the arrestee from his custody on a promise to reappear. Such a release would constitute nothing more nor less than a discretionary decision by a police officer to admit an arrested person to bail on his own recognizance. Police officers do not have such authority. LaFave, in his treatise on Arrests, observes flatly, "None of the states studied has legislation of general applicability which authorizes the police to release, on their own recognizance, persons who have been arrested and who promise to reappear . . . . " W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 172 (1965). The only general exception is traffic offenses, for which release is usually mandatory rather than discretionary.

Legislatures throughout the nation have thus determined that it is not in the public interest to delegate the discretionary decision whether to admit an arrested person to bail to police departments. This legislative judgment seems sensible in light of the magisterial nature of the bail decision as contrasted with the job of the police officer. The Washington Supreme Court's decision would contravene this legislative judgment.

II. THE WASHINGTON COURT'S OPINION WOULD

DISCOURAGE OFFICERS FROM TREATING ARRESTED PERSONS COURTEOUSLY AND HUMANELY.

The same police manuals that emphasize continued visible custody of the arrestee also emphasize that he is to be treated with courtesy and respect. E.g., E. WILLIAMS, supra, at 185 ("Note, too, that the person you arrest is to be treated with utmost courtesy, even to the point of being made comfortable, while you transport him from one point to another"). However, the decision of the Washington Supreme Court would countermand that advice.

A. Officer Daugherty's actions in this case were the product of an attempt to treat an arrested person courteously and with dignity.

Officer Daugherty's actions in this case reflected an effort simutaneously to observe a fundamental rule of arrest—visible custody of the subject—while respecting the dignity of the person arrested to the maximum extent possible. He did not frisk Overdahl, a procedure more intrusive than accompanying him. He did not handcuff Overdahl, even though many police manuals advise doing so no matter what the offense is or who the arrestee is. Even when Overdahl and Chrisman were rummaging around in the room, with Chrisman acting nervously, he acted with restraint, observing the two for 30 to 45 seconds. With such movements, he might well have taken greater precautions than he did. He was there because he was acquiescing in Overdahl's suggestion that he retrieve his identification. He conducted himself in a manner designed to obtain information that would enable him to treat the arrestee leniently. Thus obtaining identification would have allowed Daugherty to determine whether Overdahl was, indeed underage, and would also have enabled him to learn whether Overdahl was a student near his residence, a fact that might mitigate the offense or even allow Daugherty to handle the matter without blemish to Overdahl's

record. There is no question that Daugherty came across both Overdahl's offense and Chrisman's by accident. He maintained visual contact with his arrestee with the minimum possible intrusion, not entering the room until he saw contraband. In short, this was an officer who sought to use informal means to ensure protection of the dignity of the arrested person while at the same time following correct procedure and doing his duty.

B. Police officers should be able to grant reasonable requests, or briefly to investigate claims of innocence, or to otherwise treat arrested persons courteously, without violating basic safety procedures.

There are many reasons an officer might wish to allow an arrested person to go to another location, including perhaps his residence, before taking him to jail. For example, a person may have children with him or her when arrested, and common sense would dictate that the arrested person be allowed to make arrangements for them so that they do not need to be detained by juvenile authorities. Some arrested persons require medicine, and it would be inhumane to disallow officers from ensuring that they have it. Obtaining a coat in winter, leaving off valuables or perishables, or alerting a family member of one's whereabouts are all reasons that a Houston police officer may accompany a person to his home temporarily upon arrest. The need to go to the bathroom is yet another important, if mundane, consideration for an officer seeking to respect an arrestee's dignity.

In addition, an officer may wish to conduct a field investigation of a suspect's claim of innocence during the interval between detaining and imprisoning him. It is quite common, for example, for an officer to permit a suspect to retrieve proof of automobile ownership when the apparent offense is theft. Often, an automobile that has been reported stolen is recovered by an owner who fails to notify police. A relative or friend may then be stopped driving a vehicle that is "on the hot sheet" and may protest that he has the owner's permission. Releasing such a

person without verifying the story would be irresponsible, because it is precisely the claim of most persons convicted of automobile theft. Yet it would make no sense for an innocent person to be booked, fingerprinted, photographed, and imprisoned overnight while the error is sorted out. Indeed, even those who have urged limitations upon police arrest powers have encouraged broader use of post-arrest field investigation in situations such as this. E.g., LAFAVE, supra, at 351-53 (urging greater use of "voluntary custody," by which an arrestee accompanies an officer on field investigation); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184-88 (1967)(field investigation encouraged).

The Washington Supreme Court's decision would curtail these reasonable practices by its holding that the necessary accompaniment of the arrestee by the police officer, without which such practices cannot be safely engaged in, is "illegal." The likely result is clear. In fact, the police training manuals tell the officer that given this choice, he should refuse reasonable requests. For example:

> A final admonition in the techniques and mechanics of making an arrest is that *the officer should develop a "no" complex with his prisoners. This simply means that once you have determined upon an arrest and have, in effect, made the arrest, you should allow no privileges to the prisoner.* To do otherwise than this is to invite disaster to yourself and your police colleagues. (emphasis added)

R. CLIFT, supra, at 192. It is respectfully submitted that this advice should not be forced upon police officers. It does not reflect the advice Officer Daugherty followed here. It is not the approach that a reasonable and courteous, modern officer would necessarily follow, because it would disallow reasonable visits to the home, reasonable field investigation to determine innocence, and reasonable concern for the arrested person's dignity.

C. The choice forced upon police officers by the Washington court would subject them to undeserved

community hostility.

If officers are faced with the Hobson's choice whether to violate basic safety procedures by allowing arrested persons out of their custody or whether to deny even reasonable requests by arrestees, their only sensible choice would be the latter. The Washington Supreme Court's reasoning would thus force them to select a course that would further alienate them from the community. One of the most frequent complaints against police officers concerns their handling of arrested persons. Individuals of minority race are especially likely to be hostile to police forces in general because of perceived dignitary insults. PRESIDENT'S COMMISSION, supra. If a police officer in Washington State denies the request of a parent to tend to his or her children, or to produce evidence of innocence, or to use the bathroom, he will have difficulty in communicating the notion that "I must follow this procedure because the Washington Supreme Court, in Chrisman v. State, effectively required me to act this way by saying that it would be illegal for me to accompany you."

The failure to ensure comfort and fair treatment of an arrestee, including the failure to accede to reasonable requests of the sort here at issue, sometimes reflects itself in jury verdicts. Kalven and Zeisel report that juries often acquit as a sanction to post-arrest police practices of which they disapprove. Refusal to facilitate communication with family is an example. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 318-20 (1964). If Officer Daugherty had refused Overdahl's request to obtain identification only a short distance away, any criminal defense attorney who failed to exploit this discourtesy before a jury would have missed an opportunity to represent his client fully. It is not difficult to imagine circumstances in which a refusal to accede to reasonable requests could make the officer a target of a suit under 42 U.S.C. sec. 1983. Although it is a policeman's lot to undertake unpopular actions from time to time, the decision below in the present case requires him to do so needlessly.

III. THE WASHINGTON COURT'S APPROACH WOULD

DECREASE POLICE PROFESSIONALISM AND INDUCE INVIDIOUS DISCRIMINATION.

Throughout the past fifteen years, there have been calls for more professional police. See, e.g., J. SKOLNICK, THE POLICE AND THE URBAN GHETTO 10-12 (Am. Bar Found. ed. 1968). Professionals are distinguished by the use of basic, uniform fundamental procedures, rather than ad hoc action. Professionals treat each person that comes before them equally so far as the situation allows, and they do so by following the norms of the profession.

The Washington Supreme Court failed to recognize the desirability of uniform basic procedures in a profession. Such procedures are desirable, first, because they insure against lapses of attention that can cause miscarriages of professional duty. An airplane pilot should conduct an end-of-the-runway check even in the absence of affirmative evidence that his equipment is malfunctioning. A trial lawyer should have a double-entry tickler system even if he thinks he might be able to carry all his cases in his head. A surgeon should follow certain procedures to prevent disease whether objective evidence of pathology has appeared or not. There are fundamental procedures in police work whose disregard because the case is "routine" is no less likely to produce disastrous results. The instant case deals with one of them.

There is another aspect of the case that is more subtle. The arrested person in this case was an upper-middle-class college student. An officer making such an arrest might well be required, the next day, to arrest an unemployed ghetto youth on an accusation of burglary, rape or robbery. It would be desirable, in a profession, to have procedures that would ensure both safety and courtesy and that could be applied to both arrestees equally. An observer of criminal courts on a daily basis could not, it is submitted, come away from the experience without the conviction that the administration of the exclusionary rule can contribute disproportionately to racial and class discrimination, especially since it allows for adjudication without respect to the merits. The Washington Supreme Court's opinion, which holds that a college

student must be allowed to do what an officer should never allow an arrested person to do, would unintentionally contribute to a double standard. Cf. J. SKOLNICK, supra.

This Court must, in this case, enunicate a rule that will be applicable to arrests for minor misdemeanors as well as arrests for capital crimes of murder. In another context, the Court has stressed the desirability of a single, "unitary standard of probable cause." Dunaway v. New York, 442 U.S. 200 (1979). It has recognized the need for a uniform "workable rule" for intrusions into automobile passenger compartments. New York v. Belton, 49 U.S.L.W. 4915 (U.S.S.Ct. July 1, 1981). A professional police department cannot operate with one standard for "serious" arrests and a different standard for "non-serious" ones, and recognition of the interest in a uniform workable procedure is no less needed in this case.

IV. THIS CASE IS CONTROLLED BY THE PLAIN VIEW DOCTRINE, NOT BY CHIMEL V. CALIFORNIA.

Although the Washington Supreme Court relied heavily upon Chimel v. California, 395 U.S. 752 (1969), that decision is inapposite. The following statement of the correct approach is taken from a work by four law professors who have authored one of the most widely used law school casebooks on criminal procedure:

> . . . Chimel does not affect the rule that officers may seize items observed in plain view where the officers have the lawful right to be. Thus, evidence observed in plain view within the room of the arrest, or in other rooms entered while searching for the suspect or in entering or leaving the premises could be subject to seizure.

F. MILLER, R. DAWSON, G. DIX & R. PARNAS, THE POLICE FUNCTION 334 (1971). In short, Chimel applies when the officer is conducting an *intentional* search incident to an arrest, not when he happens to find contraband by accident. Chimel simply does not affect the right of Officer Daugherty to ac-

company the person he arrested, to see what he saw, or to be where he was, and the Washington court was drawn into error when it considered Chimel as the determinative authority on these questions.

V. THIS COURT SHOULD RECOGNIZE A REASONABLE, GOOD-FAITH MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE.

Even in the event that this Court should consider correct the conclusion of the Washington court that Officer Daugherty's conduct was not allowed under the fourth amendment, the exclusionary rule should not be applied here. No deterrent purpose would be served, and the disrespect that the law of search and seizure has brought upon the courts costs the criminal justice system dearly in cases such as this.

A. The Exclusionary Rule should not be applied when the purpose of deterring illegal police conduct will not be served.

In United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), the Fifth Circuit recognized "reasonable, good-faith mistake" and technical violation exceptions to the exclusionary rule. The Williams approach is carefully calibrated to serve the purposes of the exclusionary rule to the fullest. It requires that the judgmental error be an honest one—that is, that it be in "good faith." Secondly, it requires that the judgment be objectively "reasonable," so that ignorance or sloppiness will not be rewarded. The Fifth Circuit stated the latter requirement thus:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could

never qualify.

622 F.2d at 841 n.4a. The burden is on the State to prove these elements. The determination would be simple for a court hearing a motion to suppress to make because in most situations the reasonableness and good faith of the officer will be controlled by the same testimony as the determination of technical lawfulness under the fourth amendment.

The Williams opinion observes that "The Supreme Court and this Circuit have all but explicitly adopted the technical violation facet of the good-faith exception, and each has rendered several decisions that implicitly, at least, support the good-faith mistake facet . . . ." 622 F.2d at 841. The Williams opinion carefully analyzes relevant Supreme Court authority to prove this point, and that analysis of those decisions is adopted by this brief. As this Supreme Court stated in Michigan v. Tucker, 417 U.S. 433, 477 (1974),

> *The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.* By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, this deterrence rationale loses much of its force.* (emphasis added)

The Williams approach avoids upholding "willful" misconduct by its good-faith requirement, and it refrains from rewarding even "negligent" blunders by requiring objective reasonableness.

The case at bar is an example of the counterproductive application of the exclusionary rule beyond its purposes. Officer Daugherty was following procedures learned in his police training, procedures that have prevented the taking of the lives of many police officers. He did so in order to accede to the request of his arrestee in safety. To attempt to "deter" "willful" or "negligent" conduct disregarding the rights of arrested persons by sanctioning Officer Daugherty here would be an exercise in futility.

B. The principle that courts should avoid the "taint" of illegally seized evidence does not mandate the exclusion of evidence seized reasonably and in good faith. Rather, it is the needless and counterproductive exclusion of such evidence that taints a court.

A second principle that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. Thus Mapp v. Ohio, 367 U.S. 643 (1961), justified the extension of the exclusionary rule to the States by the observation that it "gives to the courts, that judicial integrity so necessary in the true administration of justice." Courts are nondemocratic institutions without independent enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect.

To the extent that there is validity to this rationale, it is the exclusion of evidence honestly and reasonably seized, not its reception, that actually taints a court.

(1) Public Impression of the Criminal Law as a Mass of Technicalities.

The first way in which the exclusion of honestly and reasonably seized evidence taints a court is by creating a public impression that the criminal law is a mass of dysfunctional technicalities. This danger was articulated by Mr. Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), as follows:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice are to nullify a sentence pronounced by a court of comptent jurisdiction in obedience to local law, and set the guilty free.

Although the error in Snyder was exclusion of the defendant from the proceedings and an improper remark by the trial judge, rather than an illegal seizure, the reasoning applies equally to the

case at bar.

(2) Haphazard Results on Guilt or Innocence.

Secondly, exclusion of reasonably and honestly seized evidence taints the criminal justice system by causing haphazard adjudication of guilt or innocence. Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary. An incident that occurred several years ago in Harris County (Houston), Texas illustrates the harm that can result. The District Attorney of Harris County presented seventy-three drug possession cases, some of which were appropriate for no-bills because of searches that would require suppression and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was unable to rationalize differential treatment of the persons involved on the basis of distinctions in the police conduct involved. Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980. The haphazard adjudication that this grand jury impliedly condemned would not be removed by the Williams approach, but it would be lessened.

(3) Demoralizing Effect upon the Honest Police Officer.

Third, exclusion of reasonably and honestly seized evidence taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Despite dictum in Dunaway v. New York concerning a "single, familiar standard," fourth amendment law immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, consent, and reasonable detention. Procedural considerations such

as standing and burden of proof influence a variety of cases. The officer will see a seemingly reasonable seizure stuck down in one case and a borderline one upheld in the next.

Even experts complain that they cannot understand search and seizure law. As one prominent Texas criminal defense lawyer has put it,

> In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of difficulty arises in applying the many guidelines to a particular set of facts. . . . Some magistrates, judges or justices believe the exclusionary rule should be abolished, while other judges believe that the exclusionary rule should not apply when the officer acts in good faith (good faith v. bad faith). Because of the difference of opinion of the judges and justices as to what is reasonable, the decisions dealing with search and seizure appear to be in a constant state of change.

Rawitscher & Carnahan, *Search and Seizure and Suppression Proceedings, in* STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE (D. Crump ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in good faith, only to be told that his conduct was illegal and must be "deterred" by suppression. Research confirms what common sense suggests: Police misconduct is most common in situations in which police officers perceive that they are unlikely to obtain justice in the court system. Cf. N. JOHNSON, L. SAVITZ & M . WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962).

The present case is an example. In an earnest effort to make logical sense of the case authority as applied to this fact situation, the Washington court followed Chimel v. California, a case that, it is submitted, is inapposite. It reached a result inconsistent with the universal teaching of police training. Officer Daugherty is consequently told that he was "willful" or "at the very least, negligent" in the words of Michigan v. Tucker. This message can only engender disrespect for courts in those who work to enforce the law.

(4) Appearance of Shifting and Inconsistent Appellate Decision-Making.

Fourth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court, for example, has withheld suppression when the illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another case. On occasion, doctrinal justification fails to prevent the appearance of a zig-zag course; this is especially so in cases involving vehicles taken to another location, containers, and searches incident to arrest. These difficulties are the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment.

In this case, a well-reasoned dissent opposes the Washington majority. Several doctrines (e.g., attenuation of taint) might reasonably have been used to reach the opposite result in a different manner. But the real reason the evidence should not be suppressed is that in this case, which is unique on its facts, the officer acted reasonably and honestly. Forthright recognition of a reasonable, good-faith exception would go far to remove the appearance of shifting doctrine and ad hoc decision-making.

(5) Effect on the Accused: Irrelevance of Guilt or Innocence

Fifth, the exclusionary rule taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. L. BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in the accused. It has been identified by wardens in some states as a greater cause of prison

unrest than food, overcrowding, or conditions of incarceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING 10 (1976). Although this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is caused by the exclusionary rule.

(6) Untruthful Fact Presentation to Jurors by Officers of the Court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruth ful impression to the trier of fact. A conscientious defense lawyer is likely to argue to the jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecution of the case without the type of evidence that is missing. The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed, but through the exercise of minimal skill, defense counsel can make a general enough reference to prevent response and still get the point across.

If the seizure was flagrantly improper, suppression may be justifiable; however, a juror is likely to feel that he has been unfairly tricked if he learns that the truth has been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Perhaps the saddest effect of this misrepresentation is its effect upon defense counsel. It is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

CONCLUSION

For these reasons, and for the reasons stated in the briefs of the State of Washington and Amicus Curiae Americans for Effective Law Enforcement, the decision of the Washington Supreme Court should be reversed. The conduct of Officer Daugherty was

proper and reasonable, and it should be so adjudicated. In the alternative, this Court should recognize a reasonable, good-faith mistake exception to the exclusionary rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have accomplished service of this brief prior to filing by depositing in a United States Post Office, first-class postage prepaid, three copies each, addressed to the following, being all counsel of record, in accordance with Rule 28.3 of the Rules of this Court: Ronald R. Carpenter, Office of the Prosecuting Attorney, Whitman County, P.O. Box 30, Colfax, Wash. 99111; and Robert Patrick, Aitken, Schauble, Patrick, Neill & Charawell, P.O. Box 307, Pullman, Wash. 99163; on this the day of August, 1981.